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OCTOBER TERM, [illegible]

ARGENTINE REPUBLIC,

Petitioner,

v.

AMERADA HESS SHIPPING CORPORATION and
UNITED CARRIERS, INC.,

Respondents.

[illegible] OF THE UNITED STATES
[illegible] CIRCUIT

[illegible]

[illegible]

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QUESTIONS PRESENTED

1. Whether the Alien Tort Statute of 1789 provides jurisdiction over a claim by a neutral shipowner, engaged in the United States domestic trade, for an illegal attack against its vessel on the high seas by a foreign state, where the state has also declined redress in violation of international law.

2. Whether the Foreign Sovereign Immunities Act of 1976 ("FSIA") must be construed as preempting the Alien Tort Statute, and as extending immunity to foreign states where international law would not accord it.

3. Whether (i) admiralty jurisdiction and (ii) universal jurisdiction are present in this case.

The caption of the case in this Court contains the names of all the parties. The listing required by Sup. Ct. R. 28.1 appears in respondents' joint brief in opposition to the petition for *certiorari* at 4, n.3.

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IN THE

Supreme Court of the United States

October Term, 1987

ARGENTINE REPUBLIC,

Petitioner,

v.

AMERADA HESS SHIPPING CORPORATION and
UNITED CARRIERS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

Opinions Below

The opinion of the court of appeals (Pet. App. 1a-21a), is reported at 830 F.2d 421 (1987). The opinion of the United States District Court for the Southern District of New York (Pet. App. 25a-35a) is reported at 638 F. Supp. 73 (1986).

Jurisdiction

The judgment of the court of appeals was entered September 11, 1987 (Pet. App. 22a). The petitioner's petition for rehearing and suggestion for rehearing *en banc* were denied on November 18, 1987 (Pet. App. 24a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provisions, Statutes, Treaties, and Foreign Law Involved*

Constitutional Provisions

1. U.S. CONST. art. IV, § 8, cl.10.
2. U.S. CONST. art. III, § 2, cl.1.
3. U.S. CONST. amend. V.

Statutes

4. The Alien Tort Statute, 28 U.S.C. §1350 (1982).
5. The Merchant Marine Act of 1920, 46 U.S.C. §861 *et seq.* (1982).
6. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1332 (a) (2)-(4), 1391 (f), 1441 (d), 1602-1611 (1982).

Treaties

7. Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312.
8. Pan-American Convention Relating to Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989.
9. Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, United States-Liberia, 54 Stat. 1739, T.S. No. 956.
10. Convention between Great Britain and Buenos Ayres, for the Settlement of British Claims. Signed at Buenos Ayres, 19th July, 1830.

Foreign Law

11. Constitution of the Argentine Republic.
12. Argentine Decree of November 4, 1828.
13. Spanish Corsair Ordinance of 1801.
14. Argentine Provisional Regulation For Privateering of 1817.

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* These are reproduced, in relevant part, at App. 1a-10a, *infra*.

Statement Of The Case

I. The Facts

A. The Respondents

On April 26, 1977, United Carriers, Inc. ("United"), owner of HERCULES, a 220,117 deadweight ton tanker of Liberian Registry, time-chartered that vessel to Amerada Hess Shipping Corporation ("Amerada Hess") for a five year period, subsequently extended by agreement.[1] The charter was negotiated and executed in New York City and required payment of monthly hire in New York as well (JA39-41).[2] Both United's agents and Amerada Hess operated the vessel from New York City (JA61-62).

From the opening of the Trans-Alaska Pipeline System in 1977, HERCULES was continuously employed in the domestic intercoastal trade of the United States, carrying full cargoes of Alaska North Slope crude oil from the southern terminus of the Trans-Alaska Pipeline at Valdez, Alaska, around the southern tip of South America to the Hess Oil Virgin Islands Company ("HOVIC") refinery located at St. Croix, U.S. Virgin Islands. All of the Alaska oil carried by HERCULES was ultimately consumed in the continental United States or purchased directly by the U.S. government. The participation of HERCULES in U.S. domestic trade was specifically provided for pursuant to the Merchant Marine Act of 1920.[3]

Under the terms of the charter, Amerada Hess was obligated to pay for the bunkers (ship's fuel) used by the vessel and it was the practice of Amerada Hess to bunker HERCULES for each round-trip voyage at the HOVIC refinery at St. Croix (JA48). The

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[1] The provisions of the charter party underscore close ties to the United States, i.e., hire (JA41), U.S. Law and General Average (JA52), Clause Paramount incorporating U.S. Carriage of Goods by Sea Act of 1936 (JA55-56), and New York arbitration (JA57-58).

[2] "JA" refers to the Joint Appendix before this Court and "A" refers to the Joint Appendix before the court of appeals.

[3] 46 U.S.C. § 877. As to the peculiar status of HERCULES as a foreign-flag vessel trading in domestic, interstate U.S. commerce, *see American Maritime Ass'n* v. *Blumenthal*, 590 F.2d 1156, 1158-1160, 1166-1168 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979).

bunkers for the ship's fatal voyage were purchased in New York City and delivered to the ship at HOVIC harbor (A58).

B. AMVER

HERCULES was a participant in the AMVER System (Automated Merchant Vessel Reporting System), an international vessel position reporting system operated by the U.S. Coast Guard in New York City, which coordinates assistance to ships in distress, regardless of nationality (A62). Argentine flag vessels also routinely use this system. Military use of information transmitted on AMVER by merchant vessels is strictly forbidden by international custom and practice (A67). The local AMVER reporting station for ships transiting the South Atlantic is "General Pacheco", a radio station operated by the Government of Argentina (A62, A68). HERCULES routinely transmitted to "General Pacheco" while in the South Atlantic, giving her name, international call sign, registry, position, course, speed and voyage description.

C. The War

On April 2, 1982, armed forces of the Argentine Republic invaded the Falkland Islands/Islas Malvinas. The outbreak of the war found HERCULES in the vicinity of Valdez, Alaska where she loaded a full cargo of Alaska North Slope crude oil for delivery to the HOVIC refinery at St. Croix. There was only one route for HERCULES' trade—around Cape Horn: with a beam (width) of 158 feet, she was unable to pass through the Panama Canal, which is restricted to vessels with beams of under 107 feet.

On May 2, 1982, HMS CONQUEROR, a Royal Navy submarine, torpedoed and sank GENERAL BELGRANO, an Argentine Navy cruiser. At about 1325[4] on May 5, 1982, HERCULES approached the area where GENERAL BELGRANO sank. The Master of HERCULES entered into contact with the Argentine Navy warship BAHIA PARAISO and offered to help look for survivors. The Captain of BAHIA PARAISO assigned HERCULES a search area in conjunction with a search area assigned to the Chilean Navy warship, PILOTO PARDO. At about 0230 on the following day,

[4] All times referred to herein are Greenwich Mean Time (GMT).

HERCULES completed the search of her sector and returned to her original course (JA70). During the search and rescue operation, Argentine naval and air forces had ample opportunity to inspect HERCULES. Thereafter, HERCULES completed her voyage to St. Croix, where her cargo of Alaskan crude oil was discharged and preparations made for the next run to Valdez.

D. Prelude to the Attack

On May 25, 1982, HERCULES departed St. Croix in ballast (i.e., without cargo) bound for Valdez. As usual, prior to sailing she had taken on a full load of bunkers. On June 2, Argentine military aircraft attacked the British-flag tanker WYE in the South Atlantic. The following day, the U.S. Maritime Administration ("MARAD") sent telexes to Argentina and the United Kingdom listing U.S. flag merchant vessels and U.S. interest Liberian flag tankers calling at Argentine ports or transiting the South Atlantic (JA59-60). The telex which was sent to the Argentine Embassy in Washington, D.C., stated in relevant part:

> 3. The following Liberian-flag tankers are carrying Alaskan oil to the U.S. Virgin Islands via Cape Horn:
>
> | | | |
> |---|---|---|
> | Hercules/6ZAB | Enroute St. Croix, VI, to Valdez, Al | ETA Exclusion Zone 8-11 June |

(JA60)

The purpose of this advice was to ensure that neither belligerent would attack neutral U.S. flag or U.S. interest vessels.

HERCULES stopped briefly at Rio de Janeiro, Brazil on June 4, 1982 for vessel support services and resumed her intended voyage around Cape Horn to Alaska. At all times, she flew the Liberian flag and was painted and outfitted as a commercial tanker. Across her stern, in accordance with international law, the vessel's name, "HERCULES", and her home port, "Monrovia", were painted in bold-faced white letters. The vessel's name was also painted on both her bows (JA63).

E. The Attack

At about 1215 on June 8, 1982, the Master of HERCULES made his routine AMVER report to the Argentine shore radio

station "General Pacheco" giving the vessel's name, international call sign, registry, position, course, speed, and voyage description of "Rio de Janeiro to Valdez, Alaska via Cape Horn" (JA 621). At about 1300, a four-engine Argentine military aircraft began circling HERCULES which was then steaming on a steady course at a steady speed. Concerned by this development, the Master repeated his earlier AMVER message at about 1344 and received a "QSL" (message received) acknowledgment from "General Pacheco" (JA62 and JA69).

Six minutes later, at about 1350, at 46° 10' South, 49° 30' West, HERCULES was attacked by an Argentine military aircraft in a low level bombing strike. The Master immediately hoisted a white flag (JA63). At this point, the vessel was 572 nautical miles from the nearest point on the Argentine mainland and 475 nautical miles from the Falkland Islands/Malvinas, well outside the exclusion zones declared by the belligerents (JA25 and JA61).

At about 1430 at 45° 16' South, 49° 25' West, the vessel was subjected to a second bombing attack. Finally, at about 1625 at 46° 08' South, 48° 55' West, HERCULES was subjected to a third attack by Argentine jet aircraft which struck the vessel with air to surface rockets. Following the third attack, the vessel changed course and steered for the nearest safe port of refuge, Rio de Janeiro, Brazil (JA61-69).

At about 1720 and 1800, *well after the end of the third attack*, an Argentine radio station, call sign LOV 3, located at the Argentine naval base at Ushusia, sent messages in English to call sign 6ZAB, HERCULES, on the international distress frequency of 2182 KZ. (JA61-68) The text of the message, spoken in plain English, was:

> Steer 270 to make Argentine Port. If you cannot make Argentine Port you will be attacked in 15 minutes time. (JA66).

These messages were received by four other ships in the area, the British hospital ships UGANDA, HECKLA, HERALD and HYDRA (JA67).

The telephone log maintained by the cognizant U.S. Coast Guard Admiral summarizes the telephone conversation between

the Defense Intelligence Agency and the Master of the stricken ship:

> Story on Attack: at 1000 local 4 engine propeller aircraft painted camouflage started circling, at 1115 attacked with depth charges, 2 hit deck, others hit hull on starboard. Then ASW type aircraft showed up and dropped 3 depth charges that landed 200 from bridge. 2 hours later 3 jet A/C arrived and one fired 2 rockets at ship, one hit. Master said he received verbal warning on 2182 fm AR. Says he spoke to AR, explained the situation and damages, and received permission to proceed without diverting to AR port (JA69).

As a direct result of the Argentine bombing and rocket attack, HERCULES suffered extensive hull and deck damage. Significantly, a bomb penetrated the ship's starboard side, lodging in the bottom of the ship's No. 2 tank, where it remained, undetonated.

F. Post Attack Events

On June 9, 1982, the Government of Liberia issued a statement which said, in part:

> ...the vessel is currently heading back to Rio de Janeiro in damaged condition. By directive of the Commissioner [of Maritime Affairs of the Republic of Liberia], the matter was reported to Admiral Sheer, Maritime Administrator of the United States, the established point of contact for vessels in danger. Admiral Sheer has contacted the Argentine and British Governments to prevent further attack on neutral vessels. Meanwhile, Deputy Commissioner George B. Cooper is working along with Ambassador Joseph Guannu, Liberian Ambassador accredited to the United States, in formulating measures to prevent any additional attacks on Liberian vessels plying international waters. (JA75-76).

Shortly thereafter, a senior official of the Argentine Embassy was summoned to the U.S. Department of State where a formal oral demarché was delivered regarding the unprovoked attack on HERCULES (JA72).

On June 12, 1982, HERCULES arrived at the port of refuge, Rio de Janeiro, Brazil. Immediately upon arrival, Brazilian naval

officers under the authority of the Captain-of-the-Port boarded the vessel and conducted a complete investigation into the circumstances surrounding the bombing of HERCULES.

The vessel's logs were verified and statements were obtained from the ship's officers. The Brazilian naval inquiry found nothing connected with HERCULES which would violate her neutral status under international law or justify the attacks on her (A81).

On June 21, 1982, the Government of Liberia, in notes directed to both the British and Argentine Governments, requested clarification of the attacks on HERCULES. On July 5, 1982, the United Kingdom replied, denying any involvement in the attack and stating that British Military Intelligence had confirmed that the attacking aircraft were from Argentina (JA73-74). No response was ever received from the Argentine government (JA72).

Damage from the attacks, and the presence of the undetonated bomb in No. 2 port wing tank, led United to determine that it was unreasonably hazardous to attempt to remove the undetonated bomb. Accordingly, on July 20, 1982, HERCULES was scuttled, along with her bunkers, at a point approximately 250 miles from the Brazilian coast. The vessel took with her 11,438 long tons of fuel oil and 12 long tons of diesel oil valued at $1,901,259.07 (A58 and A59). United's loss came to $10,000,000 (A128).

G. Presentation of United's and Amerada Hess' Claims to the Argentine Republic

Shortly after the loss of HERCULES, the attorneys representing respondents before this Court were retained to investigate the attack. Working independently, both firms came to the same conclusion, viz., that the armed forces of the Argentine Republic had attacked HERCULES, which was at all times a neutral ship exercising its undisputed right of innocent passage on the high seas. Subsequent efforts by both firms to obtain redress from the Argentine government were to no avail. *See* Affidavit of Douglas R. Burnett, Esq. dated October 2, 1985 (JA77-83); Affidavit of Raymond J. Burke, Jr., Esq. dated October 9, 1985 (JA84-88).

On August 3, 1983, attorneys for Amerada Hess presented a conclusive report on the HERCULES attack and a formal demand for restitution, including supporting documents, to the Argentine government (JA78 and A31-A77). The claim was delivered in person by Amerada Hess attorneys to the First Secretary of the Argentine Embassy in Washington, D.C., Dr. Ortegue (JA78 and A148). The First Secretary stated that the claim would be transmitted to Buenos Aires forthwith (JA78). On September 29, November 4, and November 18, 1983, as well as January 23 and February 8, 1984, Amerada Hess attorneys attempted without success to ascertain Argentina's position (JA78 and A149-A155).

On February 22, 1984, Dr. Ortegue informed Amerada Hess attorneys that the HERCULES claim was being handled jointly by the Ministry of Defense and the Ministry of Foreign Affairs in Buenos Aires. In view of this fact and the recent inauguration of the popularly elected government of President Alfonsín, Dr. Ortegue recommended Argentine counsel be retained to pursue the claim directly with the ministries involved (JA78 and A156).

Amerada Hess immediately retained the distinguished Dr. Jose Domingo Ray, who accepted appointment on the condition that he would be unable to pursue this claim publicly in the Argentine courts (JA78-79, A157-160, and A182). On March 14, 1984, Dr. Ray delivered to the Ministry of Foreign Affairs a copy of the Brazilian Navy inquiry which confirmed the neutral status of HERCULES (JA79 and A82-A130). In mid-April, Dr. Ray delivered a formal statement of the case under international law and a demand for restitution (JA78-79 and A161-A181).

Dr. Ray's efforts at negotiation with the Foreign Ministry failed and on May 24, 1984, the Ministry of Foreign Affairs replied:

> To this respect, I inform you that having in mind the nature of this case, the North American law firm of Hill Rivkins Carey Loesberg O'Brien & Mulroy can send all sort of documents, memorandum, etc. to the Argentine Embassy in Washington D.C. which will make them arrive at this legal staff. (JA79).

Dr. Ray informed Amerada Hess, "after the note received, there is no doubt that the attempt remains in a dead way" (JA79 and A183-A186).

Concerned with a two-year statute of limitations in Argentina, Amerada Hess attempted to retain four of the leading law firms

in Argentina to pursue the Amerada Hess claim in the Argentine courts (JA79-82).

The law firm of Abeledo & Gottheil y Associados declined to accept appointment, stating:

> We have studied carefully chances of success of a legal action of recovery in Argentine Courts in that we have reached the conclusion that under the circumstances of fact and applicable precedence the case has almost no probability of a positive outcome.
>
> As a consequence, we would feel uncomfortable defending a case the viability of which we do not see. We regret to tell you that we prefer not to engage in such litigation. (JA79).

The same firm sent an opinion of the National Supreme Court of Justice of Argentina whereby the court held it had no jurisdiction for acts committed by government agencies during the war (A191-A192).

On June 1, 1984, the Argentine law firm of Estudio Beccar Varela declined to represent Amerada Hess (JA80) stating:

> Without knowing whether the navigation of the HERCULES in the conflict zone was innocent or not, we may decide if we would consider assisting you in this case, because we are inclined to refrain from acting against our Government in a claim for damages reputedly resulting from war action when hostilities have not yet been brought to an end (JA80).

On June 1, 1984, the Argentine law firm of C&C Beccar Varela agreed to represent Amerada Hess (JA80). The litigation file was transferred immediately from Dr. Ray's office to that firm (JA80). On June 5, 1984, C&C Beccar Varela revoked their acceptance stating:

> ...we wish to inform you that we have received today afternoon the papers from Edy, Roche y de la Vega (Dr. Ray) and after carefully reading, we reach the moral conviction that we cannot defend the case. The facts seem to indicate that the vessel was directed by the English fleet. The geographical position is unexplainable except that, the cargo of usable gasoline and not crude, the lack of clear identification of the aircraft that bombed the ship three times and also circumstantial evidence

> against the contention of the time charterers, from our personal point of view (JA81).

Additional exchanges with C&C Beccar Varela to convince them to continue representation of Amerada Hess proved futile (JA81-82 and A203-A204). The Argentine firm maintained its position:

> As that was not a case for an Argentine, in our opinion, we communicated our negative response. (JA82).

Attorneys for United, who were kept advised of Amerada Hess' efforts to obtain redress from the Argentine Republic, decided to pursue a different avenue by meeting with a senior government official, Dr. Jorge Sabato, Vice-Chancellor of the Ministry of Foreign Affairs and Culture in Buenos Aires on March 27, 1985 (JA85-87). United's attorneys were advised that Dr. Sabato was second in command to the Minister of Foreign Affairs, with responsibility for all matters pertaining to the Falkland Islands/ Islas Malvinas.

In discussing United's claim, Dr. Sabato advised that even if it were shown that the vessel were bombed by Argentine planes (which was denied), he doubted that there existed a "framework" for any kind of settlement, the only "framework" in his opinion being (i) by contract, (ii) by regulation involving war reparations (which were not applicable to the Falkland/Malvinas conflict), or (iii) by judgment of an Argentine court (JA87). Dr. Sabato telephoned his lawyers, who confirmed this view (JA87). Dr. Sabato suggested that United file suit in Argentina, but based upon their own experience, the above-described experience of counsel for Amerada Hess, and the prevailing climate of opinion in Argentina regarding the HERCULES incident (JA88), United attorneys concluded that suit in Argentina on a claim arising from the Falkland/Malvinas conflict would be futile.

Respondents, effectively foreclosed from access to the courts of Argentina, received no response from Argentina to their offers to arbitrate, mediate, negotiate or otherwise resolve the claims.

II. The Rulings of the Courts Below

Unable to obtain so much as a hearing of their claims in Argentina, on June 7, 1985, Amerada Hess and United brought suit

against the petitioner in the United States District Court for the Southern District of New York. Respondents sought damages in tort for the loss of the vessel and bunkers and claimed that Argentina had violated international law in attacking, without cause, the neutral merchant vessel HERCULES on the high seas and, thereafter, in refusing to provide a forum for review of their rights to compensation.

The jurisdiction of the district court was invoked under the Alien Tort Statute, under the general admiralty and maritime jurisdiction, and under the principle of universal jurisdiction recognized in international law. Petitioner moved to dismiss under Fed. R. Civ. P. 12 (b)(1) and (2) for lack of subject matter and personal jurisdiction, on the ground that the FSIA was the sole source of jurisdiction in all suits against foreign states and that petitioner was immune from suit under the Act for the violations of international law alleged by Amerada Hess and United.

The district court dismissed respondents' complaints for lack of subject matter jurisdiction. The court held that "a foreign state is subject to jurisdiction in the courts of this country if, and only if, an FSIA exception empowers the court to hear the case" (Pet. App. 29a). In so holding, the court recognized that its interpretation of the FSIA narrowed the jurisdictional scope encompassed by the plain language of the Alien Tort Statute (Pet. App. 32a). To the district court it was "irrelevant that repeal by implication is disfavored" since, in the court's view, the elimination of a class of defendants under the Alien Tort Statute effected no repeal (Pet. App. 32a-33a). The court ruled that respondents' claims fell outside of "the exceptions to blanket foreign sovereign immunity provided by the FSIA" (Pet. App. 30a), and further found that respondents could "claim no loss whatsoever occurring in the United States" (*ibid*).

The court of appeals reversed, holding that the Alien Tort Statute provides jurisdiction over respondents' claims, and that the FSIA does not bar it (Pet. App. 3a). [5]

The court, in an opinion by Chief Judge Feinberg, initially examined whether the facts alleged by respondents were sufficient to state a violation of international law. Finding that the right of

[5] Feinberg, C.J., and Oakes, J.; a dissenting opinion was filed by Judge Kearse.

innocent neutral ships to free passage on the high seas was recognized in a series of "international treaties and conventions dating at least as far back as the last century," that "federal courts have long recognized in a variety of contexts that attacking a merchant ship without warning or seizing neutral's goods on the high seas requires restitution", and that the academic literature was similarly "of one voice with regard to a neutral's right of passage," the court concluded that it was "beyond controversy that attacking a neutral ship in international waters, without proper cause for suspicion or investigation, violates international law." (Pet. App. 5a-7a).

The court next determined that respondents' actions met the requirements for federal district court jurisdiction set forth in the Alien Tort Statute. The court held that:

> Although seldom employed, the Alien Tort Statute means what it says. If an alien brings a suit, for a tort only, that sufficiently alleges a violation of the law of nations then the district court has jurisdiction. See *Filartiga*, 630 F.2d 876. All of these requirements are met in the instant case. Appellants are aliens; they are Liberian corporations. This suit is for a tort only—the bombing of a ship without justification. Also. . . the suit alleges a violation of international law. (Pet. App. 7a-8a).

The court rejected petitioner's contention that the Alien Tort Statute could only be invoked against individual defendants. While expressing doubt as to whether absolute sovereign immunity would have governed at the time of its enactment, under the circumstances of this case,[6] the court held that the jurisdictional grant of the Alien Tort Statute is to be construed according to current standards of international law (Pet. App. 8a-9a).

The court found that modern international law does not extend immunity to states for the small class of actions which are generally accepted by the nations of the world as violations of international law. (Pet. App. 5a,8a-10a, and 16a). Noting, *inter alia*, such developments in this century as the rejection of sovereign immunity defenses by the Nuremberg tribunal and the emerging international law prohibition of genocide, the court reasoned that,

[6] The court recognized that"[w]here the attacker has refused to compensate the neutral, such action is akin to piracy, one of the earliest recognized violations of international law" (Pet. App. 7a).

were the result otherwise, "the exception would nearly swallow the rule" and international law, even in theory, would have little meaning (Pet. App. 9a-10a). Having established that the sinking of a neutral vessel on the high seas without justification violates a substantive principle of international law for which there is no immunity, the court sustained jurisdiction over Argentina under the Alien Tort Statute (Pet. App. 10a).

The court rejected petitioner's argument that the jurisdictional grant of the Alien Tort Statute has been preempted by the FSIA. While it stated that the FSIA as a general rule is the sole basis for United States jurisdiction over foreign states, the court found that the act's principal goals—to narrow the scope of immunity respecting the commercial activities of foreign states, to remove immunity decisions from the executive to the judicial branch so as to ensure these decisions were made on purely legal grounds, and to unify the rules of procedure relating to suits against foreign states—did not evince an intent on the part of Congress to extinguish existing remedies in United States courts for violations of international law of the type alleged by respondents (Pet. App. 11a-13a). The court reasoned that it would be-

> odd to hold that, by enacting a statute designed to narrow the scope of sovereign immunity in the commercial context, Congress, though silent on the subject, intended to broaden the scope of sovereign immunity for violations of international law. (Pet. App. 12a).

Since Congress had expressed its intent to incorporate standards recognized under international law in its enactment of the FSIA, and moreover had left the Alien Tort Statute untouched, the court held that the FSIA would not bar jurisdiction in the unusual circumstances of this case (Pet. App. 13a). The court found personal jurisdiction over Argentina was proper since, *inter alia*, the act complained of was intentional tortious injury to a vessel plying the United States domestic trade, pursuant to a contract calling for payment in the United States, and the United States government's direct communication to Argentina of its interest in HERCULES' safety was sufficient to put Argentina on notice that it might be sued here. The court was further mindful of considerations of fairness, since respondents had been denied an Argentine forum in which to pursue their claims (Pet. App. 15a).

The court emphasized that its holding was "a narrow one" and that—

> [i]t should also be noted that the burden on a plaintiff moving under the Alien Tort Statute remains great. The class of actions that are recognized as international law violations, as distinguished from a mere tort, is quite small. (Pet. App. 16a).

The dissent did not address itself to the meaning of the Alien Tort Statute, or to the question of immunity under international law for the actions complained of by respondents, since it concluded that the FSIA had foreclosed consideration of respondents' claims.

Petitioner's petition for rehearing was unanimously denied by the panel which heard the appeal, and no circuit judge voted in favor of petitioner's suggestion for rehearing *en banc*.

Summary of Argument

The court of appeals properly held that the district court has subject matter jurisdiction over a neutral's claim for loss of its ship and bunkers, where the loss was caused by the unprovoked and illegal attack by a belligerent on the high seas, *and* where, at the time of the attack, the ship was exclusively engaged in the U.S. domestic trade, as provided in 46 U.S.C. § 877, *and* where the belligerent has refused redress and denied even access to a forum in clear violation of international law.

The court of appeals' decision reaffirms ancient principles of the maritime law of nations which predate this country's founding. *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511, 545 (1828) (Marshall, C.J.); *The Lusitania*, 251 F. 715, 732-736 (S.D.N.Y. 1918). These principles are incorporated in art. I, §8, cl.10 and art. III, §2, cl.1 of the U.S. Constitution, which reserve to the admiralty courts all questions of seizure "committed on the high seas and offenses against the Laws of Nations." Under the general maritime law, U.S. admiralty courts have competently exercised this jurisdiction and enforced the neutral shipowner's right to restitution, or compensation, for the illegal seizure or destruction of ships or cargoes on the high seas by the armed forces of sovereign states, *Del Col* v. *Arnold*, 3 U.S. (3 Dall.) 333 (1796);

Maley v. *Shattuck*, 19 U.S. (3 Cranch) 458 (1806); *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818). The intent of Congress in enacting the Alien Tort Statute included ensuring that the right to compensation of an alien shipowner, whose ship and cargo had been illegally destroyed or seized in violation of the law of nations, would be protected in the same manner as that of an American shipowner. This intent is unmistakably reflected in the handwritten notes of the statute's drafter, Oliver Ellsworth, in the historical context and plain language of the statute, and in the early opinions of the judges and the attorney general who interpreted or applied this law when it was newly enacted. *Moxon* v. *The Brigantine Fanny*, 17 F. Cas. 942, 947-948 (D.Pa. 1793) (No. 9, 895); *Martins* v. *Ballard*, 16 F. Cas. 923, 924 (D.S.C. 1794) (No. 9, 175); *Jansen* v. *The Vrow Christina Magdalena*, 13 F.Cas. 356, 358 (D.S.C. 1794) (No. 7, 216), *aff'd sub. nom.*, *Talbot* v. *Jansen*, 3 U.S. (3 Dall.) 133 (1795); *Bolchos* v. *Darrell*, 3 F.Cas. 910 (D.S.C. 1795) (No. 1,607); 1 Op. Att'y Gen. 57 (1795).

The right of an innocent neutral shipowner to seek, and receive, compensation for the illegal destruction of its ship and cargo on the high seas has been recognized for centuries under customary international law. Story, *Notes on the Principles and Practices of Prize Courts* (Thomas Pratt, ed; London, 1854); Argentine Provisional Regulation for Privateering of 1817; The London Naval Conference of 1909; Pan-American Convention Relating to Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989; Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312.

Petitioner's acts are an indefensible violation of the ancient law of the sea, for which there is no immunity in international law, and for which immunity should be denied in a United States court. *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822), *The Prinz Frederick*, 2 Dods. 451 (1820). *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); Restatement (Third) of The Foreign Relations Law of the United States §404. (1986) (hereinafter Restatement).

The Foreign Sovereign Immunities Act of 1976 (FSIA) does not repeal the Alien Tort Statute of 1789. Repeal by implication is not favored. *United States* v. *Continental Tuna Corp.*, 425 U.S. 164, 168 (1976). The FSIA was intended to codify existing law, and to limit the immunity to which a foreign state may be entitled for its commercial, or private, acts. In enacting the FSIA, Congress did

not intend *sub silencio* either to repeal the Alien Tort Statute of 1789, or to abridge the general admiralty and maritime jurisdiction of the federal courts. The Alien Tort Statute provides to respondents a "remedy by a civil suit in the courts of the United States", 1 Op. Att'y. Gen. 57, 58 (1795). This remedy is not extinguished, nor are respondents' causes of action barred, by the FSIA. *Von Dardel* v. *USSR*, 623 F.Supp. 246, 254 (D.D.C. 1985).

In any event, jurisdiction is proper in this case under the FSIA pursuant to §1605 (a)(5), since the tortious act of petitioner took place on waters subject to the jurisdiction of the United States, and the injury suffered by respondents occurred within the territorial United States. Petitioner has also implicitly waived its defense of sovereign immunity under §1605 (a)(1) of the FSIA, by explicitly agreeing to the terms of conventions which protect the right of neutral vessels to innocent passage on the high seas, and mandate the payment of compensation for violation of that right. *Von Dardel* v. *USSR*, 623 F. Supp. 246, at 255.

The court of appeals applied due process standards under the Fifth Amendment, and determined that the forum in this case is the United States. *Texas Trading and Milling* v. *Federal Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1981). Petitioner's acts are torts intentionally directed at the forum. In addition to causing the loss of HERCULES and her bunkers, petitioner tortiously disrupted a crude oil transportation and distribution system vital to the economy of the United States. Petitioner was given ample notice of the intended route of HERCULES, a vessel employed in the U.S. domestic trade, prior to the attack. Besides other acts, petitioner's silence in the face of this notice was an act which led respondents to place the vessel in harm's way. In denying access to a forum and refusing compensation to the neutral respondents, petitioner must reasonably have foreseen litigation in the courts of the United States. *Calder* v. *Jones*, 465 U.S. 783, 789-790 (1984). Petitioner's objection to service of process, raised for the first time in its brief on the merits in this Court, is waived, Fed. R. Civ. P. 12 (h) (1).

POINT I

The Court Of Appeals Properly Found Jurisdiction Under The Alien Tort Statute

As the United States recognizes in its brief *amicus curiae* ("U.S. *amicus*") at p. 9, "'[i]t is well settled that the starting point for interpreting a statute is the language of the statute itself'", *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 108 S. Ct. 376, 381(1987) (quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108, (1980)).

The Alien Tort Statute was enacted nearly two hundred years ago by the First Congress of the United States, as §9(b) of the Judiciary Act of September 24th, 1789, Ch. 20, 1 Stat. 73, 77. Now codified (in virtually identical form) at 28 U.S.C. §1350 (1982), it provides:

> **§1350. Alien's action for tort.**
>
> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Although no legislative history of the original provision survives, there is every indication that it was drafted as part of the original grant of admiralty jurisdiction in the Judiciary Act of 1789.

The handwritten notes of Oliver Ellsworth,[7] the "acknowledged author" (Pet. Br. at 31), transcribe as follows:

> And shall also have exclusive original cognizance of the simple causes of admiralty and maritime jurisdiction in all seizures under laws of impost navigation or trade of the United States where the seizures are made on waters navigable from the sea by vessels of 10 or more tons burthen, within their respective

[7] Senator from Connecticut, member of the Marine Committee, creator of the Committee of Appeals in Cases of Capture of the First Continental Congress, the predecessor of the U.S. Supreme Court and the first federal court, Chairman of the Senate Judiciary committee which drafted the Judiciary Act of 1789, and Chief Justice of the U.S. Supreme Court from 1796 through 1800, Brown, *The Life of Oliver Ellsworth* (MacMillan Corporation,) 1905, pgs. 184-186.

> districts as well as upon the high seas—saving to suitors in all cases the right of a common law remedy where the common law is competent to give it, and it shall also have cognizance, concurrent with the courts of the Federal States, or the Circuit Courts, as the case may be, of all causes where a foreigner sues for a tort only in violation of the Law of the Nations or a treaty of the United States (JA 121).

A copy of these notes, reproduced from the originals by the National Archives, is contained in the Joint Appendix at JA112-121.

The wording and punctuation of the language quoted above clearly demonstrate that the Alien Tort Statute was intended to be part of the general grant of admiralty jurisdiction in the Judiciary Act of 1789[8] (now codified at 28 U.S.C. §1333 (1982)); it is only with time and successive recodification that these two provisions have been separated in the United States Code.

In the words of Oliver Ellsworth, the jurisdictional grant in §9 of the Judiciary Act covered "admiralty cases, smaller offenses and some other special cases." Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 60 (1923). Without doubt, one of these special cases was the provision contained in the Alien Tort Statute. In other words, §9 gave aliens who were victims of "tort[s], in violation of the Law of Nations" a remedy which clearly supplemented maritime torts cognizable in admiralty jurisdiction under the U.S. Const. art. III, §2, cl. 1. Since torts in violation of the law of nations at that time were in large part captures at sea by privateers or by public armed ships, pursuant to the law of belligerent prize, the Alien Tort Statute was certainly meant to assure a forum for these "special cases".

According to Blackstone, author of the leading law text of that era,[9] the "law of nations" consisted not of rules governing sovereign states in their relations with each other , but of rules of natu-

[8] The Draft Bill of the Act as published in the Boston Gazette on June 29, 1789, and July 6, 1789, further supports this conclusion (A458-A459).

[9] The first American edition of the work was printed in 1771 or 1772, and a copy with Ellsworth's name and the date 1774 on the fly-leaf was still in existence as late as 1905. Brown, *The Life of Oliver Ellsworth*, *supra* n. 7, at p. 26.

ral law—applicable to states and individuals alike—which were presumed to be identical in all states:

> The law of nations is a system of rules deducible by natural reason, and established by universal consent among the civilized inhabitants of the world, in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of Justice and good faith in that intercourse that must frequently occur *between two or more independent states and the individuals belonging to each* . . . as none of these States will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but *such rules must necessarily result from those principles of natural justice in which all the learned of every nation agree*. . . .
>
> 3 Blackstone, *Commentaries on the Laws of England*, 66, 67 (American Ed., Worcester, Mass., 1790) (emphasis supplied) (A463).

Blackstone continued, defining the civilly actionable portions of the law of nations:

> Thus. . . in all marine causes. . . the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So too, in all disputes relating to prizes, to shipwrecks, to hostages, and to ransom bills, there is no other rule of decision but this great universal law collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of. *Id.* at 67. (A463).

"[P]rizes, hostages and ransom bills" belong, in modern analogy, to that branch of the laws of war relating to individual claimants.[10]

As principal offenses against the law of nations, Blackstone listed violation of safe-conducts, infringement of the rights of ambassadors and piracy. The first of these he defined to include precisely petitioner's conduct in this case:

> I. . . *violations of safe-conducts* or *passports*, expressly granted by the king or his embassadors [sic] to the subjects of a foreign

[10] Petitioner has "no quarrel with [respondents'] contention that prize courts, *though sitting as municipal courts*, applied generally recognized rules of international law", Defendant's Response to Plaintiff's Joint Memorandum of Law in Opposition to Defendant's Motion to Dismiss, at 15.

> power in time of mutual war; *or committing acts of hostility against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct;* these are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another. . . (emphasis in second clause supplied). *Id.* at 68.

The unjustified attack on a neutral vessel on the high seas, after notice of its route of innocent passage, is certainly the violation of an implied safe conduct and one of the oldest recognized offenses against the law of nations. Since only sovereigns possessed navies and commissioned privateers, they must have been regarded as logical defendants under the Alien Tort Statute.

It was said of the pirate that he was *hostis humani generis*—"the enemy of all mankind"—and that by his "declaring war against all mankind, all mankind must declare war against him." *Blackstone*, at 71 (A465). Piracy, thus, was an "offense against the universal law of society" *(ibid)*. As the court of appeals recognized, "where the attacker has refused to compensate the neutral, such action is analogous to piracy, one of the oldest recognized violations of international law" (Pet. App. 7a).[11]

All early recorded cases in which the Alien Tort Statute appears involve maritime claims. *Bolchos* v. *Darrell*, 3 F. Cas. 910 (D.S.C. 1795) (No. 1,607); *Moxon* v. *The Brigantine Fanny*, 17 F.

[11] Piracy fits the maritime context of the sentence in which the Alien Tort Statute was originally contained. The words "civil causes of admiralty and maritime jurisdiction," however, which come before the Alien Tort Statute wording in the drafter's notes, already encompassed piracy as a matter of common usage in 1789. Blackstone notes at *71* that the pirate was recognized as the enemy of mankind, punished by anyone and anywhere (A465). The last Royal Commission as a judge of the Maryland Court of Vice-Admiralty, dated November 27, 1775, lists the jurisdiction of the Admiralty Court as including offenses by "Traytors Pyrates Manslayers Felons and Fugitivies" (JA 105). Therefore, there would seem to be no purpose in adding "in violation of the law of nations" solely to include piracy, which the drafter would have understood to be included in the wording "admiralty and maritime jurisdiction." This point is underscored by the enactment, eight months after the Alien Tort Statute was passed, of a specific piracy statute by Congress on April 30, 1790 (1 Stats. at Large 113). Had the Alien Tort Statute dealt solely with piracy, it would have been logical for Congress to repeal, modify, or refer to the Alien Tort Statute in the later piracy statute.

Cas. 942, 947-948, (D. Pa. 1793)(No. 9,895).[12] *See also Jansen* v. *The Vrow Christina Magdalena*, 13 F. Cas. 356, 358 (D.S.C. 1794) (No. 7,216), *aff'd sub nom., Talbot* v. *Jansen*, 3 U.S. (3 Dall.) 133 (1795); *Martins* v. *Ballard*, 16 F. Cas. 923, 924 (D.S.C. 1794) (No. 9,175).

The United States' contention that the Alien Tort Statute is merely jurisdictional and does not provide a cause of action (U.S. *amicus* at 27-28, n. 26) is not well founded. An opinion of Attorney General William Bradford, published in 1795, addressed the civil and criminal liability of United States citizens accused of violating a treaty, as well as the law of nations, by "aid[ing] and abett[ing] a French fleet in attacking a [foreign] settlement, and plundering or destroying the property of British citizens, on that Coast." 1 Op. Att'y. Gen. 57, 58 (1795) (A353-355). After noting that, while "transactions . . . [taking] place in a foreign country. . . are not within the cognizance of our courts", "the high seas *are* within the jurisdiction of the district and circuit courts of the United States" (emphasis in original), the opinion finds that—

> . . . there can be no doubt that the company or individuals who have been injured by these acts of hostility [on the high seas] have a *remedy* by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States. . . (The emphasis on "remedy" is supplied). (Ibid.)[13]

The plain language of the Alien Tort Statute embraces state, as well as individual defendants—states were principal subjects of

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[12] In *Moxon*, the court dismissed for lack of jurisdiction as the suit was for a marine trespass, which it did not deem to be a tort in violation of the law of nations; jurisdiction was sustained in *Bolchos*, a case sounding in prize, and the seizure of neutral "property" on board an enemy vessel on the high seas in time of war was decreed permissible prize, due to a treaty which varied the otherwise applicable rules of the law of nations.

[13] *See also* 26 Op. Att'y Gen. 250, 252 (1907) (the Alien Tort Statute "*provide[s] a right of action and a forum*" for injuries suffered by citizens of Mexico in a boundary dispute involving diversion of the Rio Grande river) (emphasis supplied) (A367-371).

the law of nations,[14] and treaties are agreements to which, by definition, states are party.[15] That this is so is underscored by the early cases in which the statute appears, which apply the law of nations and draw on principles of prize.

Seizures as prize were "acta jure imperii", adjudged according to the maritime law of nations. This is nowhere better stated than in *The Zamora*, [1916] 2 A.C. 77, 79:

> [A]ll those matters upon which the (Prize) Court is authorized to proceed are, or arise out of, acts done by the sovereign power in right of war. It follows that the King must, directly or indirectly, be a party to all proceedings in a Court of Prize. *In such a Court his position is in fact the same as in the ordinary Courts of the realm upon a petition of right which has been duly fiated. Rights based on sovereignty are waived and the Crown for most purposes accepts the position of an ordinary litigant. A Prize Court must of course deal judicially with all questions which come before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.* (emphasis added.)

Respondents stress that prize jurisdiction and *in rem* jurisdiction are separate, although frequently both are present in a prize case. It is the act of seizure on the high seas, not the presence of the ship, which triggers prize jurisdiction. Cases involving prize jurisdiction where vessels were sunk and not present *in rem* include *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818) and *Del Col.* v. *Arnold*, 3 U.S. (3 Dall.) 333 (1796). *See also* the Affidavit of British counsel in support of respondents, at JA89-96.

As Justice Story wrote:

> . . . if the prize be lost at sea, the court may, nevertheless, proceed to adjudication, either at the instance of the captors, or of the claimants; so, although the property may actually be lying within a foreign neutral territory, the Court may proceed to adjudication. Story, *Notes on the Principles and Practices of Prize Courts* (1854) at 29.

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[14] *See* Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26, 26-29 (1952).

[15] See, e.g., Restatement § 301.

Thus, in such prize cases, the court had authority to proceed *in personam*, *id.* at 110.

The prevalence of eighteenth and nineteenth century prize courts, open to claimants in belligerent or "captor" states, accounts for the difficulty in locating authority precisely on point with this case[16], and the abolition of privateering by the Declaration of Paris of 1856 (A253) may well explain later judicial inactivity under the Alien Tort Statute.

In 1980, the court of appeals, in a landmark decision on the Alien Tort Statute, echoed the natural law reasoning of the era in which it was passed. In *Filartiga* v. *Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980), the court examined a claim of deliberate torture, committed under color of government authority by a Paraguayan official against a Paraguayan citizen, *within the borders of that country*. Finding that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today"[17], the court held that the torturer had become, like the eighteenth-century pirate, *hostis humani generis*—an enemy of all mankind, subject to the jurisdiction of all courts—and sustained jurisdiction under the Alien Tort Statute.

Respondents' claims are well within the reasoning of the *Filartiga* court.[18] Indeed, the United States in a memorandum to that court, which it now seeks to discredit, correctly argued that—

> . . . *it has long been established that* in certain situations, individuals may sue to enforce their rights under international law. For example, *when a ship is seized on the high seas in violation of*

[16] *But see The Prinz Frederick*, 1 Dods. 451, 484 (1820) (salvage) ("it is not till after [the] denial of justice that recourse should be had elsewhere") (A575).

[17] A conclusion with which the United States agreed in that case, Memorandum for the United States as *Amicus Curiae* in *Filartiga* v. *Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980) *reprinted in* 19 I.L.M. 585, 588 (1980) ("[s]ince the law of nations had developed . . . by . . . customary practice, the framers of the First Judiciary Act surely anticipated that international law would not be static after 1789").

[18] In *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1988) it was recently held that "private torture will not normally implicate the law of nations since there is . . . no international consensus as to non-state actors . . . however . . . torture committed by *state officials* . . . [would] fall within . . . *Filartiga*".

> *international law, the owner of the ship may sue to recover the ship as well as seek damages* . . .[19] (emphasis added).

"Principal subjects of admiralty jurisdiction are . . . maritime torts, including captures jure belli", *The Belfast* v. *Boon*, 74 U.S. (7 Wall.) 624, 637 (1868). Matters of prize necessarily involve review, by courts in admiralty, of the conduct of military forces. *See Jecker* v. *Montgomery*, 54 U.S. (13 How.) 498 (1851); *Maley* v. *Shattuck*, 1 U.S. (3 Cranch) 458 (1806). Foreign sovereign immunity, where applicable, was not a rule of law but a question of comity. *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822).

Under the narrowest of all interpretations—reading "violation of the law of nations" to encompass only those violations recognized in 1789[20]—the district court has jurisdiction to hear respondents' claims.

Of the cases petitioner cites which have presented the question of jurisdiction over a foreign state defendant under the Alien Tort Statute,[21] only *Von Dardel* is similar in that the violation alleged (infringement of the rights of ambassadors) was also recognized in 1789. However, each of these cases allege violations of international law taking place *within* the territory of foreign countries; as such, they call into question the act of state doctrine, an issue not present in this case. Where the violation occurs on the high seas, there is no question that federal courts have jurisdiction.[22]

The decision of the court of appeals should be affirmed, and respondents' causes of action allowed to proceed.

[19] *Supra*, n. 17, 19 I.L.M. at 602.

[20] See *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 813 (D.C.Cir. 1984), *cert. denied* 470 U.S. 1003 (1985).

[21] *Von Dardel* v. *USSR*, 623 F. Supp. 246 (D.D.C. 1985); *Siderman* v. *Republic of Argentina* No. CV 82-1772-RMT (C.D. Cal., March 7, 1985) *appeal pending*, (9th Cir. No. 85-5773); *In re Korean Airlines Disaster of September 1, 1983*, 597 F. Supp. 613 (D.D.C. 1984).

[22] 1Op. Atty. Gen., *supra* at 58; *See Bernhard* v. *Creene*, 3 F. Cas 279 (D.C.Ore. 1874) (No. 1, 349); *Patch* v. *Marshall*, 18 F. Cas. 1288 (C.C.D. Mass. 1853) (No. 10, 793); *see The Belgenland*, 114 U.S. 355 (1884).

POINT II

The Right Of An Innocent Neutral Vessel At Sea To Be Free From Unprovoked Attack, And To Seek, And Receive, Compensation For Violation Of That Right Is A Universally Accepted Rule Of Law

The right of a neutral merchant vessel to innocent passage on the high seas, and the obligation of belligerent states to entertain claims for losses suffered by violation of that right, are "by the general consent of the civilized nations of the world, and independently of any express treaty or other public act . . . established rule[s] of international law". *The Paquete Habana*, 175 U.S. 677, 708 (1900). There is no question that destruction of an innocent merchant vessel, without cause or provocation, mandates compensation of ship and cargo.

Customary international law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law", *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 160-161 (1820). International law protecting the safety of neutral merchant vessels in time of war, as reflected in the regulations and practices of nations, is traced in *The Lusitania*, 215 F. 715, 732-736 (1918), beginning with the year 1512. Indeed, the inviolability of neutral ships and cargoes has been traced by the Argentine scholar and diplomat Charles Calvo as far back as the thirteenth century.[23]

The rights of neutrals generally to compensation were established as long ago as the Roman era. In his seminal work, *The Law of War and Peace*, Grotius, in Chapter XVII entitled "On Those Who Are of Neither Side In War" wrote:

> I. *From those who are at peace nothing should be taken except in case of extreme necessity, and subject to the restoration of its value*
>
> It might seem superfluous for us to speak of those who are not involved in war, since it is quite clear that no right of war is valid against them . . . . [T]he necessity which gives any right over another's property must be extreme; furthermore, that it is

[23]Calvo, *Le Droit International Theorique et Pratique* (Paris 1888), at 300 (translated at A524).

> requisite that the owner himself should not be confronted with an equal necessity; that even in case there is no doubt as to the necessity more is not to be taken than the necessity demands; that is, if retention is sufficient, then the use of a thing is not to be assumed; if the use is sufficient, then not the consumption; if consumption is necessary, the value of the thing must then be repaid.

Grotius, *The Law of War and Peace*, Book III, chap. XVII, para. I, reprinted in 2 *Classics of International Law* 783 (James Brown Scott, ed.) (Clarendon Press, 1925). Grotius then cites examples of restitution for damage to crops and foodstuffs of neutrals during the campaigns of Sulla, Pompey [sic] and Domitian, *id.* at 784.

A scholarly and complete treatment of the international law applied by English prize courts in 1789, and the rights accorded neutral merchant vessels at that time, is contained in the Affidavit of British counsel in support of respondents (JA89) and will not be repeated here. The principles embodied in these decisions were adopted and applied by American courts, even before the existence of this nation;[24] undoubtedly they were well known to the framers of the Judiciary Act and to the drafter of the Alien Tort Statute.

The law of that era respecting destruction of a neutral vessel was well stated by Lord Stowell, England's greatest admiralty judge:

> Where it is neutral, *the act of destruction cannot be justified to the neutral owner, by the gravest importance of such an act to the public service of the Captor's own state; to the neutral it can only be justified, under any such circumstances, by full restitution in value.* (Emphasis suppli 1.) *The Felicity*, 2 Dods. 381, 386 (1820) (A358).

[24]*See* Roth, *The Massachusetts Vice-Admiralty Court and the Federal Admiralty Jurisdiction*, 6 Am. J. of Leg. History 347, 367; F. Wiswall, *The Development of Admiralty Jurisdiction and Practice since 1800* (1970); Gilmore & Black, *The Law of Admiralty*, 44 (1975); Robertson, *Admiralty and Federalism*, Chapter IV, (1970); Story, *Notes on the Principles and Practice of Prize Courts*, 1-11 (Thomas Pratt, ed.; London, 1854) (A231 and A349-352); Royal Commission as Judge of the Maryland Court of Vice-Admiralty (JA105).

Liability for wrongful destruction of a neutral vessel is founded on liability for wrongful capture.[26] The capture of a merchant vessel in time of war must be made in accordance with the general principles of visit and search, and the duty to safeguard life, long recognized in international law. Where capture of a neutral vessel is found to be invalid, even though the act of destruction is itself held justifiable, compensation must be paid to injured parties.[29]

As to the obligation of the court in adjudicating matters of capture or prize, Lord Stowell said:

> [T]he duty of my station calls. . . me. . . to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the Law of Nations holds out, without distinction, to independent states, some happening to be neutral and some to be belligerent. *The Maria*, 1 C. Rob. at 340, 349 (1799) (A375).

The birth of the United States in an era of naval strife, and against the background of English restrictions on American trade, resulted in a profound commitment to the ideas of freedom

[26] An excellent discussion of this point is contained in Sanders, *The Destruction of Prizes at Sea*, U.S. Naval Institute Proceedings (1935) (A387); *see also* Story, *Notes on the Principles and Practice of Prize Courts* pps. 3-4; Smith, *Part II Neutral Merchantmen—The Destruction of Merchant Ships Under International Law* (A433); *The Law of Naval Warfare* (A400).

[29] The universal obligation to abide by these rules, and to honor restitution or compensation claims by neutral vessels, is reflected as well in the usage and practice of nations. For example, Argentina has demanded and received compensation from Germany for the sinking of neutral merchant ships on the high seas by U-boats, *New York Times*, August 24, 1917, p. 1., and Scheina, *Latin America. A Naval History* 1810-1987 (1987), pp. 101-102; in *The I'm Alone* (Canada v. United States), 3 U.N. Rep. Int. Arb. Awards 1609, 1618 (1933) (A529), American and Canadian Claims Commissioners recommended, in addition to compensatory damages, payment of $25,000 by the United States to Canada as a "material amend" for the unjustified intentional sinking of a Canadian vessel (A540); *and see* the numerous examples cited at p. 10, n. 12 of respondents' joint brief in opposition to the petition for *certiorari*.

of navigation and commerce.[27] The principles and sense of obligation expressed by Lord Stowell were strengthened and expanded in American courts, which "construe[d] the jurisdiction of the admiralty upon enlarged and liberal principles", *DeLovio* v. *Boit*, 79 F. Cas. 418, 441 (C.C.D. Mass. 1815) (No. 3,776).[28]

Relief for capture or destruction of a neutral vessel is sought from the sovereign interest, not by diplomatic means through the flag state of the vessel aggrieved, but by trial in the admiralty court. The law of nations imposes a duty on the belligerent power to provide access to its prize courts for the adjudication of such claims. In the words of Justice Story:

> By the maritime law of nations, universally and immemorially received, there is an established method of determination whether the capture be, or be not, lawful prize.
>
> Before the ship, or goods, can be disposed of by the captors, *there must be a regular judicial proceeding, wherein both parties may be heard; and condemnation thereupon as prize, in a Court of Admiralty, judging by the law of nations and treaties.*
>
> The proper and regular court, for these condemnations, is the court of that State to whom the captor belongs.
>
> Story, *Notes on the Principles and Practices of Prize Courts* (Thomas Pratt, ed.; London, 1854) (Emphasis supplied.)

It has been said that these rules of custom are "so clear in principle, and established in practice, that they require neither reasoning nor precedent to illustrate or support them", *The Felicity*, 2

[27] *See* A. Rappaport, "Freedom of the Seas", 2 *Encyclopedia of American Foreign Policy* 387; R. Bartlett, "Neutrality", 2 *Encyclopedia of Foreign Affairs* 680 (1973).

[28] In a letter to Lord Stowell acknowledging the present of a copy of some of his judgements, Justice Story wrote:

> In the excitement caused by the hostilities then raging between our countries, I frequently impugned your judgements and considered them as severe and partial, but on a calm review of your decisions after a lapse of years, *I am bound to confess my entire conviction both of their accuracy and equity. I have taken care that they shall form the basis of the maritime law of the United States*, and I have no hesitation in saying that they ought to do so in that of every civilized country in the world. (Emphasis supplied.) Holdsworth, *A History of English Law*, VI. XIII at 679.

Dods. 381 (1820). It will suffice for respondents here to refer to the major codifications in this century.[29]

The London Naval Conference of 1909 provides:

Article 48. *A neutral vessel which has been captured may not be destroyed by the captor: she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture.*

• • • • •

Article 50. Before the vessel is destroyed *all persons on board must be placed in safety*, and all ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the warship.

Article 51. *A captor who has destroyed a neutral vessel must* , prior to any decision respecting the validity of the capture, *establish that he only acted in the face of an exceptional necessity* of the nature contemplated in article 49. If he fails to do this he must compensate the parties interested and no examination shall be made of the question of whether the capture was valid or not.

Article 52. *If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties interested in place of the restitution to which they would have been entitled.*

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[29]The United States' argument (U.S. *amicus* at p.4, n.4) that the Geneva Convention on the High Seas of 1958, and the United Nations Law of the Sea Convention of 1982 are "oriented toward peacetime" — is untenable. Since the execution of the United Nations Charter in 1945, which was intended to *outlaw* war, it has become questionable whether there now exists such a thing as a legal state of war under international law. International agreements drafted since that time often presume its illegality, and hence do not reflect "wartime" orientation. *See* Restatement §711,comment (h); *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 42 (1826)("the right of visitation and search. . . is strictly a belligerent right, allowed by the general consent of nations in time of war").

Article 53. *If neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation.*

• • • • •

Article 64. *If the capture of a vessel or of goods is not upheld by the prize court, or if the prize is released without any judgment being given, the parties interested have the right to compensation,* unless there were good reasons for capturing the vessel or goods. (Emphasis supplied) (A285-A288).

The Pan-American Convention Relating to Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989, to which petitioner is signatory, provides:

Article 1. The following rules shall govern commerce in time of war:

1. *War-ships of the belligerents have the right to stop and visit on the high seas* and in territorial waters that are not neutral any merchant ship with the object of ascertaining its character and nationality and of verifying whether it conveys cargo prohibited by international law or has committed any violation of blockade. *If the merchant ship does not heed the signal to stop, it may be pursued by the warship and stopped by force; outside of such a case the ship cannot be attacked unless, after being hailed, it fails to observe the instructions given it.*

The ship shall not be rendered incapable of navigation before the crew and passengers have been placed in safety.

• • • • •

Article 27. A belligerent shall indemnify the damage caused by its violation of the foregoing provisions. It shall likewise be responsible for the acts of persons who may belong to its armed forces. (Emphasis added) (A292).

The Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312 ("Geneva Convention") — which has been adopted by the United States, and to which petitioner is signatory — again restates these principles, and further reflects their establishment as applicable to action by aircraft:

Article 1. The term 'high seas' means all parts of the sea that are not in the territorial sea or in the internal waters of a State (A319).

Article 2. The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:

(1) Freedom of navigation;
(2) Freedom of fishing;
(3) Freedom to lay submarine cable and pipelines;
(4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

• • • • •

Article 22. 1. Except where acts of interference derive from powers conferred by treaty, *a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:*

(a) That the ship is engaged in piracy; or
(b) That the ship is engaged in slave trade; or
(c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the case provided for in sub-paragraphs (a), (b), and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. *If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.* (A322).

Article 23.

• • • • •

5. *Where hot pursuit is effected by an aircraft*: [30]

(a) The provisions of paragraphs 1 to 3 of the present article shall apply *mutatis mutandis*;

(b) The aircraft giving the order to stop must itself actively pursue the ship until a ship or aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft itself is able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by aircraft itself or other aircraft or ships which continue the pursuit without interruption.

• • • • •

7. *Where a ship has been stopped or arrested on the high seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.* (Emphasis supplied) (A322-A323).

Articles 110 and 111 of the 1982 United Nations Law of the Sea Convention ("LOS") incorporate almost verbatim the above provisions of the Geneva Convention, with minor changes in language to make clear, for example, in Article 110, *Right of Visit*:

4. These provisions shall apply *mutatis mutandis* to military aircraft. (A334).

Finally, the choice of words in Articles 22.3 and 23.7 of the Geneva Convention (repeated exactly in Articles 110 and 111 of LOS)—which provide that where a vessel is unjustifiably damaged or destroyed "*it* shall be compensated"—is significant. In contrast, for example, Article 106 of LOS as to unjustified seizure for piracy provides that:

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, *the State making*

[30] Article 23.1 provides that 'hot pursuit' "must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing state. . ." (*ibid.*)

the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure. (Emphasis supplied) (A333).

Thus, it is clear that the rules codified in both these conventions relating to claims such as respondents' speak to a *private* right of compensation from the state.

To borrow this Court's words in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 429 (1964), "[t]here are few, if any issues in international law today on which opinion . . . [is] so . . . [*united*]" as the right of an innocent neutral vessel at sea to be free from unprovoked violence, and to seek, and receive, compensation for the indefensible violation of that right.

POINT III

The Court Of Appeals Correctly Found There Is No Immunity In This Case

In *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 429 (1964), this Court declined to rule on the validity of a Cuban government expropriation of foreign corporate assets, made within the territory of Cuba, because it found that there were "few if any issues in international law" as divisive as the limitations on a state's power to expropriate alien property. Although it therefore did not reach the question of immunity where the act of a foreign state violates universally accepted principles, the Court stressed that "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it", *id.* at 428.[31]

International consensus is the philosophical underpinning of the eighteenth-century law of nations, conceived of as "this great universal law collected from history and usage, and such writers

[31] The question was addressed in the lower courts, which held that immunity would not shield clear violations. *Banco Nacional de Cuba* v. *Sabbatino*, 307 F. 2d 845, 860 (2d Cir. 1962) ("national sovereignty is not absolute but is limited, where the international law impinges, by the dictates of this international law"); *Banco Nacional de Cuba* v. *Sabbatino*, 193 F. Supp. 375, 381-82 (S.D.N.Y. 1961) ("[t]here is an end to the right of national sovereignty when the sovereign's acts impinge on international law").

of all nations and languages as are generally approved and allowed",[32] and traditionally administered in admiralty by the domestic courts of different countries. The jurisprudential concept of a universal law of nations is implicit in the Alien Tort Statute of 1789. In the twentieth century, it finds expression in the principle of universal jurisdiction, set forth in §404 of the Restatement:

> *§404. Universal Jurisdiction to Define and Punish Certain Offenses*
>
> A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, *even where none of the bases of jurisdiction* [to prescribe] *indicated in §402 is present.* (Emphasis supplied).

The Comments make clear:

> *a. Expanding class of universal offenses. This section, and the corresponding section concerning jurisdiction to adjudicate, §423, recognize that international law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the victim).* Universal jurisdiction over the specified offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations. These offenses are subject to universal jurisdiction as a matter of customary law. . . .
>
> *b. Universal jurisdiction not limited to criminal law.* In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy. (Emphasis in text supplied).

[32] Blackstone, *Commentaries on the Laws of England* 66, 67 (American Ed., Worcester, Mass., 1790).

Petitioner's reliance on §402 of the Restatement, entitled "Bases of Jurisdiction to Prescribe", is misplaced. Clearly §404 provides the appropriate basis of jurisdiction in this case.[33]

The rationale underlying the progressive limitation of the concept of sovereign immunity, and the relationship between the concepts of sovereign immunity and universal jurisdiction, has been explained, in terms of the development of international human rights law, as follows:

> *As the international consensus condemning certain behavior becomes universal, the inertial force of the prohibitory norm of non-intervention diminishes correspondingly.* The non-intervention principle will thus pre-empt international prohibitions of human rights violations only when the prohibited conduct is either not a concern of states collectively or is defensible as an expression of legitimate political diversity. . . . J. Blum & R. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga* v. *Pena-Irala*, 22 Harv. Int'l. L.J. 53, 77 (1981) ("Blum & Steinhardt"). (Emphasis added).

[33] Petitioner's argument that recognition of respondents' causes of action would violate international rules of jurisdictional competence is without merit. §404 expressly states that it is not limited to the bases of jurisdiction to prescribe contained in §402 (which nonetheless would indicate jurisdiction here under subsection (1)(c)). By definition, adjudications based on established principles of international law are not prescriptive, but constitute the application of standards already binding on all jurisdictions. Jurisdiction to prescribe is defined, in § 401 (a), as the capacity of a state "to make *its* law applicable. . . ." (emphasis supplied). Respondents here seek application by the courts of the United States of the *law of nations*, as the appearance below of the Republic of Liberia underscores. Moreover, the International Court of Justice has recognized that "United States courts are competent to apply international law in their decisions", *Interhandel Case* (*Switzerland* v. *United States*) [1959] I.C.J. Rep. 4, 28.

The article cited by petitioner, *Abandoning Restrictive Sovereign Immunity: Analysis in Terms of Jurisdiction to Prescribe*, 26 Harv. J. Int'l Law 1 49-61 (1985) recognizes the applicability of universal jurisdiction to clear rules of international law, but classifies it as "concurrent prescriptive jurisdiction". The term is particularly apposite in the case of maritime torts on the high seas, which are "the common property of all nations", *The Adventure*, 1 F. Cas. 202 (C.C.D.Va. 1812) (No., 93), *rev'd on other grounds*, 12 U.S. (8 Cranch) 221 (1814). Indeed, the author suggests that—

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While the emergence of universal "norms" of human rights in international law is a relatively recent development, the right of neutral vessels to be free from unprovoked attack on the high seas—which are *communis juris*[34]—has been the subject of international consensus since well before the existence of this country (*supra*, Point II). The admiralty courts of individual nations have for centuries applied a universal maritime law—including the law of belligerent prize—under which the rights of individual claimants, as against the sovereign interest, are determined according to the laws of war.[35]

The very existence of prize courts, which rendered judgment on "acts done by the sovereign power in right of war" at sea,[36] and upheld the right to compensation where a neutral vessel was damaged or destroyed in violation of international law—in breach of the laws of war—demonstrates an early shared expectation among nations that no immunity attaches in such cases. *See* Affidavit of Anthony Peter Clarke, Q.C. and Nigel Robert Jacobs, dated September 27, 1985 (JA89); and Affidavit of Dr. Ved P. Nanda dated October 9, 1985 (JA97).

The rules of international law have undergone a profound evolution in the twentieth century, and the rejection of former absolutist notions of sovereign immunity has been one of the most

Footnote continued from previous page

> there would be no reason to grant sovereign immunity to a foreign sovereign when the law of the forum is in full harmony with international law on the particular issue raised. It would be hard to find any affront to the independence, equality, and dignity of a sovereign in subjecting it to a municipal law whose requirements reflect a clear international standard. *Id.* at 55.

[34] *See Lord* v. *Goodall, Nelson & Perkins Steamship Company*, 102 U.S. (12 Otto.) 544 (1880); *Bernhard* v. *Creene*, 3 F. Cas. 279 (D.C.D. Ore. 1874) (No. 1, 349).

[35] In *What Does Tel Oren Tell Lawyers?*, 79 Am. J. Int'l Law 92 (1985), a debate between two scholars of diametrically opposed views produced agreement on only this point.

[36] *The Zamora*, [1916] 2 A.C. 77, 91.

significant developments.[37] As the court of appeals observed in *Filartiga* v. *Pena-Irala*, 630 F. 2d 876, 890 (2d Cir. 1980), "[s]purred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior."

Customary international law today is the outgrowth of, *inter alia*, the Charter of the United Nations, the expressed will of nation states through the prolific creation of international instruments and treaties, and the extensive post-war military tribunals. In particular, after 1945 new rules became part of the body of international law and traditional rules were strengthened and expanded, so as to explicitly reach even acts committed by states within their own territory against their own citizens.[38] Forty years ago Professor Jessup noted by example the "numerous provisions in the [United Nations] charter which recognize that the treatment of the individual citizen is no longer a matter solely of domestic concern and that the denial of fundamental human rights to a citizen can no longer be shrouded behind the impenetrable cloak of national sovereignty", and observed—

> Sovereignty in the sense of exclusiveness of jurisdiction, in certain domains, and subject to overriding precepts of constitutional force, will remain a usable and useful concept just as in the constitutional system of the United States the forty-eight states are considered sovereign. *But sovereignty in its old connotations of ultimate freedom of national will unrestricted by law, is not consistent with the principles of community interest and of the status of the individual as a subject of international law. . . .*

P. Jessup, *The Subjects of a Modern Law of Nations*, 45 Mich. L. Rev. 383, 407-8 (February, 1947) (emphasis supplied).

The Nuremberg trials held criminal the activities of government officials who, among other crimes against humanity, facilitated genocide within Germany and occupied countries. The sovereign immunity defense raised by the leaders of Nazi Ger-

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[37] *See* Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, B.Y.I.L. XXVIII (1951) at 228, to the effect that no rule of international law obliges states to grant jurisdictional immunity to other states.

[38] *See* Blum & Steinhardt, *supra* at 66-67.

many was emphatically rejected by the Tribunal.[39] Moreover, in *In re Yamashita*, 327 U.S. 1 (1946), this Court did not consider a sovereign immunity defense for high ranking foreign officers accused of violating international law in foreign territory. The post-Nuremberg world has, by "the general assent of civilized nations", *The Paquete Habana*, *supra*, greatly expanded the list of prohibited international crimes and "universal offenses", Restatement §404, Comment (a) and Reporter's Note 3. The traditional concept of sovereign immunity is, of necessity, correspondingly diminished, and will not lie where universally recognized violations of international law are concerned.

In *Sabbatino*, Justice White argued against application of the act of state doctrine where he believed that the defendant had violated international law, and said in his dissent:

> The reasons for nonreview, based as they are on traditional concepts of *territorial* sovereignty, lose much of their force when the foreign act of state is shown to be a violation of international law. All legitimate exercises of sovereign power, whether territorial or otherwise, should be exercised consistently with rules of international law, *including* those rules which mark the bounds of lawful state action against aliens or their property located *within the territorial confines of the foreign state.* (Emphasis supplied). 376 U.S. at 457 (White, J., dissenting).

"[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance",[40] *Baker* v. *Carr*, 369 U.S. 186, 211 (1962), and it has been observed that "[t]he dignity of foreign states is no more impaired by their being subjected to the law, impartially applied, of a foreign country than it is by submission to their own law", Lauterpacht, *supra*

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[39] *The Nurnberg [sic] Trial* 1946, *reprinted in* 6 F.R.D. 69, 110-111. At Nuremberg, Admirals Rader and Doenitz were convicted of violating international law by setting up large operational zones and ordering indiscriminate submarine attacks without warning on all vessels, neutral or otherwise, found in those zones. Brittin, *International Law for Seagoing Officers*, at 249 (1981).

[40] As this Court noted in *Sabbatino*, 376 U.S. 398, 428, the balance may shift in favor of assuming jurisdiction "if the government which perpetrated the challenged act of state is no longer in existence." Such is the case here.

at n. 37. Moreover, the act complained of here is contrary to the domestic law of Argentina[41] and petitioner's disingenuous reference to "claims . . . traditionally . . . the subject of diplomatic es-

[41] Argentine prize law and practice, beginning in its War of Independence with Spain, drew heavily on Spanish law. The Spanish Corsair Ordinance of June 20, 1801 (App. 8a-9a, *infra*) was utilized by Argentine prize courts without change until supplemented by Argentina's Provisional Regulations For Privateering issued on May 5, 1817. Moreno, *Las Presas Maritimas En La Republica Argentina*, Centro de Estudio de Derecho Internacional Publico, (1926), pp. 1-26; *Historia Maritima Argentina*, Vol. IV, pp. 464-502 (1985), publication of the Armada Argentina. This code incorporated the law of nations. For example, Articles 8 and 19 (App. 9a, *infra*) mandated the use of prize courts for adjudication of prizes, Article 21 (App. 8a, *infra*) guaranteed the right of innocent passage to neutral ships, and Articles 22 and 44 (App. 9a-10a, *infra*) directed restitution of neutral property or payment of compensation. Under Article 22, the king was obligated to "resolve the compensation and the rest that corresponds in order to correct damages and to avoid it in the future." Argentine prize cases are reported through 1836, including several where restitution was ordered to neutral ship and cargo owners, see *The Hazard*, Corsarios: 1818-1830, Legajo 2, numero 88 (1827) (restitution and damages for illegal capture in favor of American shipowner affirmed on appeal).

In the war between Argentina and Brazil, the Argentine government, in its decree of November 4, 1828 (App. 8a, *infra*) created a three member commission to consider and settle claims by neutral shipowners for illegal acts committed by Argentine privateers.

On July 19, 1830, Argentina and Great Britain entered into a convention which provided for a commission in London to hear claims brought by individual ship and cargo owners (App. 6a-8a, *infra*). Art. V states that the commissioners, both in deciding the cases and in procedure, "*shall guide themselves by the general rules and practice according to the Law of Nations*" (App. 7a, *infra*). Both Great Britain and Argentina appointed commissioners. In case of disagreement, an umpire, the ambassador of Denmark, later substituted by Sweden, was involved. Of interest is *The Concord* decision, where the Swedish ambassador directed Argentina to pay the shipowner's damages for the captor's failure to exercise visit and search before seizing the ship. Moreno, *supra* at pp. 54-57, and 77-78. According to Moreno, *supra* at 109, although the prize regulations were abrogated by Art. 100 of the Argentine Constitution, Argentine federal courts have jurisdiction over such cases under the same article which gives the courts their "admiralty and maritime jurisdiction." Moreno, *supra*, pp. 108-109. Art. 31 of the Constitution, (App. 8a, *infra*) incorporates the "Law of Nations" and also "Treaties [which are] the supreme law of the nation."

pousal, international conciliation or consensual arbitration or litigation in an international forum"[42] ironically underscores the denial of justice[43] by all avenues to respondents in Argentina and their inability to pursue their claims elsewhere.[44]

Whatever may be the status of rights more recently defined as being of universal concern, such as those now recognized by the international law of human rights, it has long been established

[42] In fact, it is traditional that claimants such as respondents exhaust their remedies in the prize courts of the belligerent state *before* resorting to diplomatic intervention, *The Zamora* [*1916*] 2 A.C. 77, 91.

[43] Denial of justice is itself an established violation of international law. *See* Restatement §711 and §711 Comment (a); §906 and Comments to 906; H.W. Briggs, *The Law of Nations —Cases, Documents & Notes* at 677-680, (2d Ed. 1952; Appleton-Century-Crofts, Inc., New York). The term has been defined broadly to include error resulting in manifestly unjust judgments; and narrowly to apply simply to the obstruction of access to courts. I. Brownlie, *Principles of Public International Law*, at 529-531(Clarendon Press; Oxford; 3rd ed. 1979). Credit for development of the concept of "denial of justice" has been claimed on behalf of Latin America, by Latin American jurists. J. Irizarry y Puente, *The Concept of Denial of Justice in Latin America*, 43 Michigan L. Rev. 383 (1944). Latin America accepts the concept insofar as it bespeaks an *obligation* to allow foreigners easy access to national courts and to legal remedies. Whiteman, *Digest of International Law* (1963) viii at 727 (quoting from Inter-Am. Juridical C'ee Report, 1961); and Brownlie, at 530. On the requirement of exhaustion of local remedies before a claim of denial of justice may be made, Sir Hersh Lauterpacht has said:

> The requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity. In particular, they have refused to act upon it in cases in which there are, in fact, no effective remedies available owing to the law of the State concerned or the conditions prevailing in it.
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> *Case of Certain Norwegian Loans* (France v. Norway), Judgment, July 6, 1957, separate opinion by Judge Lauterpacht, I.C. J. Reports (1957) 39.

[44] Argentina is not subject to the compulsory jurisdiction of the International Court of Justice or, as far as respondents are aware, of any other international tribunal.

that "[n]eutral trade is entitled to protection in all courts",[45] *The Bermuda's Claimants* v. *United States*, 70 U.S. 514, 551 (1865). The "simple, humane and universally accepted" right of neutral vessels to be free from unprovoked and illegitimate acts of violence has been recognized in the law of nations over centuries. *The Lusitania*, 251 F. 715 732-736 (S.D.N.Y. 1918). The obligation to provide access to justice where that right is violated is similarly grounded in the immemorial practice of maritime nations.

"In cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence", *The Peterhoff* v. *The United States*, 72 U.S. (5 Wall.) 28, 57 (1866).

Where the injury complained of is the unprovoked and illegal attack on a neutral merchant vessel in innocent passage on the high seas, while engaged in the United States domestic trade, and where petitioner has refused to provide so much as a hearing of the injured parties' claims, respondents submit that the court of appeals correctly denied immunity to petitioner for its acts in violation of the ancient law of the sea.

POINT IV

The FSIA Should Not Be Interpreted So As To Impliedly Repeal The Alien Tort Statute Of 1789, Or To Abridge By Implication The General Admiralty Jurisdiction Of The Federal Courts

[45] The competence of federal courts, under United States law, to hear claims such as respondents' in admiralty cannot be questioned. "Every violent dispossession of property on the ocean is, *prima facia* a maritime tort; as such, it belongs to the admiralty jurisdiction . . . ", *L'Invincible*, 14 U.S. (1 Wheat.) 238, 257-258 (1816) (holding that a sovereign cannot be held accountable in another nation's courts for the *legitimate* exercise of wartime powers, and recognizing the necessity of judicial review: "[w]ithout the exercise of jurisdiction thus far, in all cases, the power of the admiralty would be inadequate to afford protection from piratical capture", *id.* at 258). As petitioner recognizes, "the cases defining the 'jurisdiction' of admiralty courts use that term in the sense of judicial jurisdiction or *competence* of courts" (emphasis supplied). Brief for Appellee at 13, *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (1987).

The Alien Tort Statute by its very terms vests jurisdiction in the district court to hear respondents' claims. It provides to respondents both a right of action and a forum.[46] The jurisdictional requirement of a violation of the law of nations, or a violation of a treaty, by definition contemplates state, as well as individual, defendants. Respondents are aliens; they sue in tort; and the injury of which they complain violates principles recognized in the law of nations since ancient times and for which that law does not accord immunity (Point II, *supra*).

The FSIA contains no repealing clause, and there is no mention of the Alien Tort Statute in the Act, or in its legislative history. Congress is "presumed to legislate with knowledge of former related statutes", *Continental Insurance Co.* v. *Simpson*, 8 F.2d 439 (4th Cir. 1925). The legislative history of the FSIA evinces an extraordinary amount of care and attention on the part of the drafters. More than ten years elapsed from the time that Congress began its study of possible legislation in the area to the time of enactment of the final bill. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 14 *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6608 ("House Report"). The body of the Act is contained in §§1330 and 1602-1611 of Title 28; §§1332 (diversity), 1391 (venue), and 1441 (actions removable) were all amended concurrent with the passage of the Act. The Alien Tort Statute, §1350 of Title 28, in close proximity on the statute books to two of the amendments, and to the newly added §1330, was left completely untouched.

In contrast, when the FSIA was enacted Congress specifically chose to eliminate diversity jurisdiction over foreign states under 28 U.S.C. §1332 (*see* former text of §1332 at 62 Stat. 869, 930 (Act of June 25, 1948) Ch. 646). No similar modification was made to §1350, and Congress' decision not to limit jurisdiction over foreign states under the Alien Tort Statute is particularly significant, since states are principal subjects of treaties, and of the law of nations,[47] plainly referred to therein. Congress clearly did not intend, in enacting the FSIA, to eliminate that jurisdiction *sub silencio*. *Von Dardel* v. *Union of Soviet Socialist Republics*, 623 F. Supp. 246, 254 (D.D.C. 1985). "It is, of course, a cardinal principle of

[46] *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 777-782 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied, 470 U.S. 1003 (1985)*; 26 Op. Att'y. Gen. 250, 252-253 (1907).

[47] *See* Dickinson, *supra* n.14; The Nurnberg Trial [sic] 1946, *reprinted in* 6 F.R.D. 69, 110—111.

statutory construction that repeals by implication are not favored", *United States* v. *Continental Tuna Corp.* 425 U.S. 164, 168 (1976).

The legislative history of the FSIA, which begins by expressing concern as to whether United States "citizens will have access to the courts to resolve *ordinary* legal disputes" involving other countries (emphasis supplied) (House Report at 6605), demonstrates that the focus of Congress in enacting the FSIA was overwhelmingly directed toward commercial matters. The proposed bill is described as "urgently needed" "in a modern world where foreign state enterprises are every day participants in *commercial* activities"(*ibid.*) (emphasis supplied), and the committee hearings and reports are replete with illustrations and hypotheticals referring specifically to business situations (House Report; *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. (1976) ("1976 Hearings")).[48] The legislative history indicates that even FSIA §1605 (a) (5), which refers to non-commercial torts, although deliberately "cast in general terms" was drafted "primarily [with] the problem of traffic-accidents" in mind (House Report at 6619-6620). FSIA §1605(a) (3) (relating to expropriation claims), on which the United States attempts to rely (U.S. *amicus* at 24) as evidence that Congress considered extraordinary violations of international law in drafting the Act, is inextricably tied to the commercial activities of foreign states or their agencies and instrumentalities.

There is simply no mention in the Act, or in its legislative history, of non-"ordinary" violations of international law, such as that suffered by respondents, or such as arise in the area of human rights.

[48]The United States' reference (U.S. *amicus* at 20) to Representative Jordan's query about the *Mayaguez* incident, and whether it would have been affected in any way by a bill such as the FSIA, is misleading. Legal Adviser Leigh's response that "there's nothing in this bill which would affect that situation-nothing" (*1976 Hearings*, at 53-54) entirely supports respondents' position that the FSIA does not extinguish the long established right of a shipowner whose vessel is destroyed on the high seas in violation of international law to sue for compensation from the state.

The Alien Tort Statute serves an important purpose—it is "an extraordinary basis of federal jurisdiction" which allows access to federal courts where "the conduct of the parties so offends the standard of conduct underpinning international relations that it can be considered to be a violation of the law of nations", *Valanga* v. *Metropolitan Life Insurance Company*, 259 F. Supp. 324, 328 (E.D. Pa. 1966); *IIT* v. *Vencap, Ltd.*, 519 F. 2d 1001 (2d Cir. 1975).

As the court of appeals recognized, the class of actions that rise to the level of an international law violation is extremely small (Pet. App. 16a). Of suits brought under the Alien Tort Statute, *see, e.g., DeWit* v. *KLM Royal Dutch Airlines*, N.V., 570 F. Supp. 613 (S.D.N.Y. 1983) (no action for infringement of constitutional rights, or for breach of contract); *Huynh Thi Anh* v. *Levi*, 586 F. 2d 625 (6th Cir. 1978) (no action for claim by resident alien for custody of children); *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.) (mere fact that every nation's municipal law may prohibit theft does not incorporate "the Eighth Commandment, 'Thou Shalt Not Steal' [into] the law of nations"). Petitioner's contention that a court sustaining jurisdiction under the Alien Tort Statute "constitute[s] itself as an international claims court" is without merit (Pet. Br. at 16).[49]

It has never been a rule of law that foreign states must be accorded immunity in United States courts[50]—"[a]s *The Schooner Exchange* made clear, foreign sovereign immunity is a matter of

[49]Nor does the court of appeals' decision grant, as petitioner and the United States suggest, greater rights to aliens than to United States citizens to sue foreign states. Courts have declined to interpret the FSIA as shielding foreign states from liability for conduct "clearly contrary to the precepts of humanity as recognized in both national and international law", *Letelier* v. *Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980); *accord*, *Liu* v. *Republic of China*, 642 F. Supp. 297, 305 (N.D. Cal. 1986). Petitioner's allusion to *Chaser Shipping Corp.* v. *United States*, 649 F. Supp. 736 (S.D.N.Y. 1986), *aff'd*, 819 F.2d 1129 (2d Cir. 1987) (unpublished opinion), *cert. denied*, 108 S.Ct. 695 (1988), is misleading. The "doctrine of foreign sovereign immunity is quite distinct from the doctrine of domestic sovereign immunity . . . being based upon considerations of international comity. . ., rather than separation of powers". *Sanchez-Espinoza* v. *Reagan*, 770 F. 2d 202, 207 n.5 (D.C. Cir. 1985).

[50]Nor is there any rule of international law requiring immunity. *See* Lauterpacht, *supra* at n.37.

grace and comity on the part of the United States," *Verlinden* v. *Cental Bank of Nigeria*, 461 U.S. 480, 486 (1983).

The doctrine expounded in *The Schooner Exchange*, on which the United States mistakenly relies, is one of implied consent by the territorial sovereign to exempt the foreign sovereign from *its* "exclusive and absolute" jurisdiction, an implication based, in a proper case, upon considerations of comity, *id.* at 136-144. Under *The Schooner Exchange*, the immunity of the foreign state is an exception to the territorial jurisdiction of the local state[51]—there is no blanket immunity enunciated for foreign states as a general rule, nor is any principle of international law invoked as granting a foreign state immunity as a matter of right. Moreover, this presumption of a voluntary waiver of territorial jurisdiction by the local sovereign is reversible:

> "Without doubt, the sovereign of the [local state] is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, *or by subjecting* [the public armed vessels of the foreign state] *to the ordinary tribunals . . .*" 11 U.S. (7 Cranch) at 146 (emphasis supplied).

As this Court has recognized, the FSIA was intended to codify existing law, and was "designed to remove one particular barrier to suit namely, sovereign immunity. . .", *Dames & Moore* v. *Regan*, 453 U.S. 654, 685 (1981). The FSIA codifies the "restrictive theory" of immunity, the thrust of which is to limit the immunity to which a foreign state may be entitled for its commercial, or private, acts. The "restrictive" doctrine is itself a product of the progressive rejection of the concept of sovereign immunity as a whole; forty years ago it was observed that its development was "was not altogether unrelated to the incipient recognition of human freedoms as part of positive international law," Lauterpacht, *supra* at n. 37. Petitioner's, and the United States', interpretation of the FSIA would result in a contraction of existing jurisdiction

[51]This distinction apparently eludes the United States, although it is acknowledged in the legislative history of the FSIA. *Compare* U.S. *amicus* at 8 (FSIA "*lifts* a foreign state's immunity to suits . . .only if") with House Report at 6606 "(Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, *relinquish jurisdiction* over a foreign state") (emphasis in both quotations supplied).

over foreign sovereigns when the Act was the product of a trend, and an intention, to expand it.

The illogic of the construction urged by petitioner and by the United States, and the soundness of the court of appeals' analysis may be illustrated by reference to *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822), which was a suit to recover property seized in violation of the law of nations on the high seas, by a public warship of the Buenos Aires government of the United Provinces of Rio de la Plata. Although engaged at the time in a war of independence with Spain, the United Provinces were treated by the Court as an independent sovereign for purposes of the rules of belligerent rights. The property—a prize, taken in breach of the laws of neutrality—was brought into a United States port, and this Court, affirming the lower court decisions, decreed restitution to the original Spanish owners. The case exemplifies jurisdiction over foreign sovereign acts in violation of the law of nations. Justice Story's opinion noted that grounds for immunity were "not founded upon any notion that a foreign sovereign had an absolute right" and that foreign ships of war entering United States ports may receive immunity, as a matter of comity, only if they "demean themselves according to law"; the Court found that prizes taken in violation of the law of nations are "infect[ed] . . . with the character of torts" and that property taken by a foreign sovereign in violation of the law of nations "is liable to the jurisdiction of our Courts." *Id.* at 349, 352-354.

The necessary consequence of the arguments advanced by petitioner and by the United States[52] as to the "restrictive theory" embodied in the FSIA, and as to the "exclusivity" of that statute, is that such a case could not be brought today—either by an alien, or by a United States citizen. This, respondents submit, stands the underpinning of a doctrine, aimed at narrowing the scope of immunity overall, on its head—the result is to require a breadth

[52]The United States' contention that recognition of respondents' causes of action "would adversely affect the foreign relations of the United States" is belied by its position in *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980): "[when] there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection . . .

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of immunity not recognized in even the eighteenth century. It would, indeed, be "odd" to hold that by enacting the FSIA Congress tacitly intended to broaden the scope of immunity to this degree (Pet. App.12a).

"International law is part of our law, and must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending on it are duly presented for their determination", *The Paquete Habana*, 175 U.S. 677, 700 (1900). International law outlaws, and abhors, the act of violence suffered by respondents (*supra*, Point II). Moreover, it has been recognized by the International Court of Justice that universally accepted rights "are the concern of all states", that all states "have a legal interest in their protection" and that "they are obligations *erga omnes*", *Case Concerning The Barcelona Traction Light & Power Co.* (Belg. v. Spain), 1970 I.C.J. 4, 33 para. 33.

It is a fundamental rule of construction that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently, can never be construed to violate neutral rights . . . " *The Charming Betsey*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). The legislative history of the FSIA indicates that the Act was intended to incorporate, and be consistent with, "standards recognized under international law" (House Report at 6606, 6613). Respondents respectfully submit that it would be error to construe the FSIA in a manner inconsistent with, or violative of, international law, by requiring immunity for—and therefore sanctioning— the international law violations presented in this case.

Nor should the FSIA be interpreted so as to abridge, by implication, the Constitutional grant of admiralty and maritime jurisdiction to the federal courts, U.S. Const. art. III, §2. *Panama Railroad Co.* v. *Johnson*, 264 U.S. 375 (1924).

Federal courts in admiralty traditionally "administer the law of nations in a season of war, and . . . determine the question of prize

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there is little danger that judicial enforcement will impair our foreign policy efforts", *Memorandum for the United States as Amicus Curiae, Filartiga* v. *Pena Irala*, 630 F.2d 876 (2d Cir. 1980) *reprinted in* 19 I.L.M. 585, 601 (1980).

or no prize in . . . judicial proceeding[s]", *The Propeller Genesee Chief*, 53 U.S. (12 How.) 443 (1851). *See also The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818) (under the general admiralty and maritime jurisdiction, federal courts have jurisdiction without reference to statute to hear suits sounding in prize). Indeed, the admiralty jurisdiction predates the Constitution, in which it is incorporated: "[t]hese cases are as old as navigation itself, and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise", *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511, 545 (1828) (Marshall, C.J.).

Respondents' claims fall within the traditional ambit of the admiralty jurisdiction of the federal courts. "[T]here are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without", *Panama Railroad Co.* v. *Johnson*, *supra* at 386. The section-by-section analysis submitted with the proposed bill for the FSIA in 1973 indicates that the Act was not intended "to alter the specialized jurisdictional regimes . . . dealing with admiralty, maritime and prize cases", and that *"[a]ctions in such areas, even if against a foreign state, would continue to be governed by these special regimes", Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973) at 47 (emphasis supplied). Respondents respectfully urge that the FSIA should be interpreted consistently with the constitutional grant of admiralty jurisdiction by reference to §1603(c) and §1605(a)(5), as discussed *infra*, at Point V.

POINT V

Petitioner Is Not Entitled To Immunity Under The FSIA.

Since the tortious act of the Argentine Republic took place on the high seas, and the losses suffered by respondents occurred within the United States, the requirements of the exception to immunity contained in FSIA §1605(a) (5) are satisfied. There is no "discretion" to commit illegal acts, *Letelier, supra,* 488 F. Supp. at 673, and exceptions to immunity in the FSIA are "based upon the general presumption that states abide by international law", *West* v. *Multibanco Comermex*, 807 F.2d 820, 826 (9th Cir. 1987), *cert. denied*, 107 S.Ct. 2463 (1987).

By statutory definition, the tort took place in the United States. Under 28 USC §1603(c), the term "United States" includes "all territory and *waters*, continental and insular, *subject to the jurisdiction of the United States.*" (Emphasis supplied.)

The word "territory" includes not only land but coastal waters including "a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles", *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 122 (1922); *Law of Naval Warfare*, Article 412 (A412). Modern usage has extended U.S. territory to 200 nautical miles. "Ocean Policy and the Exclusive Economic Zone," U.S. Dept. of State Policy No. 471, March 10, 1983 (A343-A346). By treaty, the United States recognizes waters beyond the territorial sea (12 miles) and the exclusive economic zone (200 miles) as the high seas. Art. 1, Geneva Convention on the High Seas, 13 UST 2312 (1958). ("The term 'high seas' means all parts of the seas that are not included in the territorial sea or in the internal waters of a state") (A319); Convention on the Law of the Sea (1982) (A328, A330); Proclamation by the President of the United States, March 10, 1983 (A341); *The Law of Naval Warfare*, Article 413 (A412). Accordingly, "waters" in 28 U.S.C. §1603(c), refers to waters beyond the territorial sea, or the high seas.

The scope of §1603(c) is made plain in the legislative history, H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1975), *reprinted in* [1976] U.S. Code Cong & Admin. News 6604, 6614 as follows:

> (c) United States—Paragraph (c) of section 1603 defines "United States" as including *all* territory and *waters subject to the jurisdiction of the United States.* (Emphasis supplied).

The attack on HERCULES took place on the high seas, "waters . . . subject to the jurisdiction of the United States."[53] For example, in *The Plymouth*, 70 U.S, (3 Wall.) 20, 36 (1865), the Court defined tort jurisdiction in admiralty as follows:

> "Every species of tort, however occurring, and whether onboard a vessel or not, if upon the high seas or navigable waters is of admiralty cognizance."[54]

See also United States v. *Matson Navigation Co.*, 201 F.2d 610, 613 (9th Cir. 1953) and *Waring* v. *Clark*, 46 U.S. (5 How.), 441, 474, (1847) citing Story, 3 *Com. on Const.* §1659, at 496:

> "The jurisdiction claimed by the courts of admiralty as properly belongs to them extends to all acts and torts done upon the high seas . . ."

Even if this Court were to interpret the "waters" language of 28 U.S.C. § 1603(c) as excluding some portion of the high seas, no interpretation could be proper which excluded waters where ships such as HERCULES, engaged solely in the U.S. domestic trade, sail on voyages from one U.S. port to another U.S. port. Therefore, under 28 USC §1603(c), the tortious attack on HERCULES occurred within the "United States".

Respondents have sustained direct financial losses occurring in the United States. The charter hire which Amerada Hess paid United for the use of HERCULES was payable in New York each month in the minimum sum of $184, 770 (clause 5 of the charter party calculates hire at $2.25 per ton x 82,120 tons) (JA-41); the loss of these payments was suffered in New York by United, which also suffered the loss of a vessel employed in the United States domestic trade. Amerada Hess was deprived of the use of a vessel in the domestic, intercoastal trade, and of the bunkers aboard her which were sold and delivered within the United States. Injury was also suffered by virtue of the disruptive effect of the loss of HERCULES on the energy policies of the United

[53] The legislative history indicates that a tortious act or omission under §1605(a) (5) need not physically occur within the United States, but "must occur *within the jurisdiction* of the United States". *Id.* at 6619 (emphasis supplied).

[54] This definition was later modified in *Executive Jet Aviation Co.* v. *Cleveland*, 409 U.S. 249 (1972) to "require also that the wrong bear a signifi-

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States, as well as on the supply of American crude oil to Hess' U.S. refinery (A58 and JA109-111). Similar losses have been found to satisfy the requirements of the FSIA.

In *Matter of Rio Grande Transport, Inc.*, 516 F. Supp. 1155 (S.D.N.Y. 1981), a vessel owned by an agency of the Algerian government collided with an American flag ship on the high seas, resulting in the loss of the American vessel, her cargo, and five of her crew. In response to claims brought by attorneys for the cargo owner—the government of Tunisia—as well as attorneys for the next of kin of the deceased crewmen, the American shipowner filed a limitation proceeding. At the same time, Algeria asserted a claim of sovereign immunity on behalf of its government-owned corporation. The court found that the Algerian claim of sovereign immunity must fail under the provisions of the FSIA. Specifically, the court found that the freight due the American owner, payable in the United States, constituted a financial injury within the United States, *id.* at 1163. The court found further that the loss of Tunisia's grain cargo had a direct effect on the United States because the grain was purchased through the United States government's P.L. 480 program, and the loss of grain impeded American foreign policy means and objectives, *id.* at n. 9. United's loss of the vessel and charter hire, and Amerada Hess' loss of use of HERCULES and her bunkers, with the resulting disruption to its American refining operations, similarly satisfy the "damage to, or loss of property, occurring in the United States" requirement of FSIA §1605 (a) (5). Accordingly, since both the tort and the injury occurred within the United States, the Argentine Republic is not entitled to immunity under the FSIA.

The *amicus curiae* brief of the Republic of Liberia in the court below rightly pointed out that a denial of access to United States courts can be considered a violation of the Treaty of Friendship, Commerce and Navigation Between the United States and Liberia, August 8, 1938; United States—Liberia, 54 Stat. 1739, T.S. No.

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cant relationship to traditional maritime activity." *Id.* at 268. An attack by military aircraft delivered against a ship at sea bears "a significant relationship to traditional maritime activity." *T.J. Falgout Boats, Inc.* v. *United States*, 508 F.2d 855, 857-858 (9th Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975).

956 ("FCN Treaty").[55] There is little doubt that if the facts before the Court were the same, but HERCULES an American flag ship, respondents would be entitled to their day in court.

In addition to the tort occurring in waters subject to the jurisdiction of the United States, as has been shown, in the case of a U.S. flag vessel, the tort would be deemed to have occurred within United States territory.

In *Wildenhus' Case*, 120 U.S. 1, 12 (1886), this Court found:

> "The general rule is well established, that the vessels of a nation are to be considered as part of its territory, and the persons on board them are deemed to be within the jurisdiction of such nation, and are protected and governed by the laws of the country to which such vessel belongs."

See also S.S. "Lotus", (France v. Turkey) 1927 P.C.I.J. (ser. A) No. 10, at 30-31 (Sept. 7) (collision on high seas between French and Turkish ships; courts of both countries have jurisdiction for criminal acts and compensation).

The territorial aspect of flag jurisdiction is "chiefly applicable to ships on the high seas, where there is no territorial sovereign," *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 123 (1922). *See also* Art. 6, Geneva Convention, (A320), *supra* at 4, and Art. 92 of LOS (A331), "ships shall sail under the flag of one state only and . . . shall be subject to its exclusive jurisdiction on the high seas."

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[55] Article I of the FCN Treaty guarantees to respondents "freedom of access to the courts of justice [of the United States] on conforming to the local laws, as well as for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law," and provides that respondents shall "receive the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law." (*supra* at p. 6). The FCN treaty is self-executing without reference to statute. "It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself, without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." *Asakura* v. *Seattle*, 265 U.S. 332, 340, 342 (1924). The United States' construction of Article I of the FCN Treaty (U.S. *amicus* at p. 10, n.7) is disingenuous: if the FSIA is a "'local law' to which respondents must conform," then so is the Alien Tort Statute.

Jurisdiction would thus exist under FSIA §1605 (a) (5), as both the tort and the injury would be deemed to have physically occurred in U.S. territory.

POINT VI

The District Court Has Personal Jurisdiction Over Petitioner

This Court, in *Insurance Corp. of Ireland* v. *Compagnie Des Bauxites De Guinea*, 456 U.S. 694, 704 (1982), defined the requirement for personal jurisdiction as "a legal right protecting the individual", and has further stated that it "'must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause' rather than a function 'of federalism concerns'." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 427 n.13 (1985), quoting *Insurance Corp. of Ireland* v. *Compagnie Des Bauxites De Guinea*, 456 U.S. at 702-703 n.10 (1982).

Whatever rights petitioner may have to avoid being haled into a U.S. Court (which have not already been addressed in connection with its claim of immunity),[58] these do not arise as an individual liberty interest under the Due Process Clause of the Fifth Amendment. It is inconceivable that petitioner should be accorded rights under the United States Constitution which have been denied to the individual states of the United States. *See South Carolina* v. *Katzenbach*, 383 U.S. 301, 323 (1966); *Palestine Information Office* v. *Shultz*, 674 F. Supp. 910, 919 (D.D.C. 1987), *aff'd*, No. 87-5398 (D.C. Cir., August 5, 1988) (Lexis: Genfed Library; U.S. App. File)("If the States of the Union have no due process rights, then a 'foreign mission' *qua* 'foreign mission' surely can have none").

Even assuming, *arguendo*, that the determination of personal jurisdiction in this action is informed by the traditional due proc-

[58] In *Olsen By Sheldon* v. *Government of Mexico* 729 F.2d 641, 650 (9th Cir.), *cert. denied*, 469 U.S. 917 (1984), the court noted that "by denying immunity to foreign states defending certain claims, the FSIA reflects the modern realities of the interdependence of nations. Because personal jurisdiction turns on a determination of immunity, the FSIA represents Congress' decision that jurisdiction does not pose an affront to the sovereignty of the defending nation so serious as to preclude it."

ess inquiry, petitioner's mechanical approach to the issue ignores "the particular situation examined", *Hewitt* v. *Helms*, 459 U.S. 460, 472 (1983), and belittles the interest of this nation, and of the community of nations, in the freedom of the seas.

Although the Court addressed appropriate personal jurisdiction standards for common law claims in an international context in *Asahi Metal Industry* v. *Superior Court*, 480 U.S. 102 (1987), the standard for claims in an international context within the admiralty jurisdiction of United States courts has been different. Contrary to the cautionary approach advocated for common law claims in Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l. Comp. L. 1 (1987), the greater opportunities for denial of justice in the context of maritime claims have permitted admiralty courts to liberally exercise both *in rem* and *in personam* jurisdiction. *In Re Louisville Underwriters*, 134 U.S. 488, 493 (1890). For example, it has been held that ordinary due process requirements for minimum contacts applicable to common law claims are not strictly applicable in admiralty. *See, e.g., Merchants National Bank* v. *Dredge General G.L. Gillespie*, 663 F.2d 1338, 1350 n.18 (5th Cir. 1981); *Amstar Corp.* v. *S/S Alexandros J.*, 664 F.2d 904 (4th Cir. 1981); *Schiffahartsgesellschaft Leonhardt & Co.* v. *A. Bottacchi S.A.*, F.2d 1528, 1535 (11th Cir. 1985) *(en banc)*, *Polar Shipping Ltd.* v. *Oriental Shipping Corp.* 680 F. 2d 627 (9th Cir. 1982); *Grand Bahama Petroleum* v. *Canadian Transportation*, 450 F. Supp. 447, 459 (W.D. Wash. 1978).

The court of appeals properly found that petitioner has sufficient contacts with the forum so that the exercise of jurisdiction does not offend traditional notions of fair play and justice (Pet. App. 14a). Since respondents' causes of action are uniquely federal and maritime, the court correctly defined the "forum" as the United States, citing *Texas Trading and Milling* v. *Federal Republic of Nigeria*, 647 F. 2d 300, 314 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982): "[t]he relevant area for delineating contacts is the entire United States." *See* Degnan & Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 Hasting L.J. 799, 802-816 (1988); *Engineering Equipment Co.* v. *S.S. Selene*, 446 F. Supp. 706, 709-710 (S.D.N.Y. 1978);

Holt v. *Klosters Rederi* A/S, 355 F. Supp. 354, 357 (W.D. Mich. 1973).[57]

The HERCULES attacks were not simply an isolated series of attacks on an innocent ship remote from the United States (Pet. App. 16). The attacks were carried out on a crude oil transportation system which had been in operation without change since 1977 (JA20, JA22 paras. 6, 7, and 17). HERCULES was the domestic sea transportation component, authorized by 46 U.S.C. §877, which delivered Alaskan crude oil directly to the HOVIC refinery at St. Croix where it was refined and distributed to homes, businesses and U.S. government agencies throughout the continental United States.[58] Petitioner's attacks on HERCULES were a disruption of this supply system (June 16, 1982 letter to President Reagan from Congressman Young, JA109). Accordingly, there can be no serious dispute that petitioner's attack disrupted the Amerada Hess Alaskan oil distribution system with direct effects attributed to Alaska and the U.S. Virgin Islands, as well as the various states which depend on Alaskan oil for a source of their refined petroleum products. This injury clearly occurred in the forum and constitutes an overwhelming contact.

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[57] A "national contact test" is supported by petitioner's contention that the Due Process Clause of the Fifth Amendment governs *in personam* jurisdiction (Pet. Br. at 12). Moreover, petitioner's contentions with respect to its contacts "*with the United States*" assume the applicability of a national contacts test (Pet. Br. at 35).

[58] The parent of respondent Amerada Hess, a Delaware Corporation, invested over $80 million dollars in building its "Alaskan Crude Oil Refinery Unit" at HOVIC for this system. Typically 83% of the refined products from HERCULES' cargoes was consumed in the continental United States, with the balance purchased directly by the U.S. government. An economic analysis of this system is contained in *American Maritime Association* v. *Blumenthal*, 590 F. 2d 1156, 1158-59 n.10 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979). Petitioner was fully aware of this trade from the hundreds of daily AMVER messages sent by HERCULES to petitioner's radio station "General Pacheco" on its identical voyages in 1977-1982. (JA20-21). AMVER is operated by the U.S. Coast Guard pursuant to 46 C.F.R. §307.

Petitioner is not before this Court because of the unintentional "placement of a product into the stream of commerce", which this Court considered in *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102 (1987). Nor is petitioner here because of a breach of contract as in *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985).[59]

Petitioner is here because it intentionally attacked a "United States interest" neutral vessel employed in the United States domestic trade. Petitioner's intentional acts caused injuries indisputably within the forum and call for application of jurisdictional standards appropriate to the nature of its actions. The "intentional, and allegedly tortious actions, were expressly aimed at [the United States] . . . [a]nd they knew that the brunt of . . . the injury would be felt by respondent[s] in the [United States] . . . [u]nder the circumstances, petitioner must 'reasonably anticipate being haled into court there.' " *Calder* v. *Jones*, 465 U.S. 783, 789-790 (1984).[60] This is especially true since petitioner shut the door to its forum on respondents' claims. *McGee* v. *International Life Ins.*, 355 U.S. 220, 223 (1957).

A "single indirect contact" which arises from the cause of action is sufficient to satisfy due process requirements. *See Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414-415 (1984); Degnan & Kane, *supra*, at 820. This is particularly true when, instead of a product being carried into a forum by chance, petitioner has carried out an intentional tort directed against that forum's economy. The attack on the crude oil system, of which HERCULES was a vital link, is a sufficient contact by any jurisdictional yardstick.

The attack also directly caused the loss of the charter hire payments due in New York City, and of the bunkers which had also

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[59] Both *Asahi Metal Industry Co.* v. *Superior Court*, *supra*, and *Burger King Corp.* v. *Rudzewicz*, *supra*, are also distinguishable because they involve consideration of due process under the 14th amendment in connection with a state long-arm statute, factors not present in this case.

[60] §421 (2)(j) of the Restatement recognizes a similar "effects" test with respect to jurisdiction to adjudicate under international law.

been purchased in New York (JA41 and A58).[61] *See In the Matter of Rio Grande Transport Inc.*, 516 F. Supp. 1115, 1163 (S.D.N.Y. 1981) (loss of freight payable in the United States, and grain cargo exported from the United States, due to a collision on the high seas constitute injuries in the United States for jurisdictional purposes.)

Petitioner's claim that it did not "engage in any purposeful activity directed at the United States for which it could have reasonably anticipated being haled into Court in this country" (Pet. Br. at 40) is inconsistent with the record before the Court. The June 3, 1982 warning delivered to the Argentine Embassy by the U.S. government stated that "the Liberian Flag tankers are carrying Alaskan oil to the U.S. Virgin Islands via Cape Horn" (JA60). The warning was followed by the specific identification of HERCULES, her route, and her ETA (estimated time of arrival) of 8-11 June (JA60). The warnings were received, as shown by petitioner's use of the HERCULES call sign in the "cover up" message following the attacks (JA23, para. 28). It is hard to imagine how a more straightforward and clear warning of the neutral noncombatant status of HERCULES and its nexus to the United States could be drafted. The warning on its face clearly informed Argentina that HERCULES was on a voyage from one U.S. port to another U.S. port, and that the ship was to be afforded identical treatment to the U.S. flag ships listed in the same message (JA60). The message is more than a "fair warning that a particular activity may subject [petitioner] to the jurisdiction of a foreign sovereign." *Burger King Corp.* v. *Rudzewicz*, *supra* at 472, quoting *Shaffer* v. *Heitner*, 433 U.S. 186, 218 (1977). Petitioner's argument that it was not reasonably foreseeable that there would be litigation resulting from its attack on HERCULES is untenable, in view of its clear violation of international law and the universally recognized compensatory obligations for such conduct.

Petitioner was under an affirmative duty to advise the United States or the ships involved that their rights of innocent passage would not be respected. Since petitioner cannot truthfully claim

[61] The charter was negotiated and executed in New York City (JA41). HERCULES was operated by United's agents and Amerada Hess from that city (JA61-62). The attacks also destroyed this New York-based commerce and further deprived respondent Amerada Hess of the use of HERCULES in the U.S. domestic trade.

the appearance of HERCULES was unexpected (JA20-23, paras. 8, 9, 11, 16, 19, 21, and 23),[62] petitioner's silence, following receipt of the United States warning, misled respondents to believe that HERCULES would not be harmed on its voyage. Petitioner's silence in the face of such warnings was a message in itself and induced reliance by respondents which must be considered an act for jurisdictional purposes.[63]

HERCULES was a participant in the AMVER system (JA21, paras. 10 and 11) and the complaint specifically alleges that Argentina "made improper use of the AMVER System for military purposes, in violation of international law and practice." (JA25, para 39). It further appears that petitioner had purposefully availed itself of the benefits of the U.S. Coast Guard's AMVER system on a continuous and systematic basis.[64] Petitioner tortiously misused the information provided by AMVER to aid its attack on HERCULES (JA25). Yet, petitioner has attempted to ignore its use of HERCULES' AMVER reports when discussing

[62] Petitioner's logic would similarly dismiss the white flag flown by HERCULES before the second and third attacks as insufficient notice (JA63). The white flag of surrender under "customary international law" is notice to a belligerent that noncombatants are present or that enemy forces have surrendered. Further attacks are strictly prohibited. *The Commanders' Handbook on the Law of Naval Operations* (NWP 9) (1987) at §11.10.4.

[63] The complaint and record also set out the direct contact between petitioner's armed forces and HERCULES in searching for the survivors of the Argentine cruiser GENERAL BELGRANO (JA21-22, Paras. 15 and 16, and JA70). During the search by HERCULES in the sector assigned to it by the Argentine Navy ship BAHIA PARAISO, the ships "exchanged information". (JA70). Without question, these acts of petitioner's armed forces are directly related to the later loss of the ship. These acts, and petitioner's exclusion zone limits, induced respondents to believe that the ship and her cargo would be safe as long as they maintained neutral status and complied with international law. Had petitioner warned them to the contrary, the fatal voyage could have been avoided.

[64] According to the Coast Guard, Argentina is a participant in AMVER. In 1973, for example, 75 Argentine ships participated in the AMVER System, "Your Key to Safer Seas", U.S.C.G. Pub. 1, 27; 1987 U.S.C.G. AMVER statistics. In the South Atlantic, the AMVER Reporting Station was General Pacheco, a radio station operated for the AMVER system by the Argentine government (A62-69).

its contacts with the United States. This is clearly an act arising out of the liability sued upon, sufficient alone to establish jurisdiction with the forum.[65]

For the first time in this litigation, petitioner challenges service of process.

Petitioner moved to dismiss the complaints of respondents for lack of subject matter jurisdiction and personal jurisdiction pursuant to Fed. R. Civ. P. 12(b) (1) and (2), (A21, A23). No mention was made in the motion of Fed. R. Civ. P. 12(b) (3) and (4), covering insufficiency of process and insufficiency of service of process, or Fed. R. Civ. P. 4, covering service of process. The record on appeal and transcript of oral argument are similarly void of any references by petitioner to service of process or Fed. R. Civ. P. 4. Finally, the "Questions Presented" on the petition for *certiorari* contain no mention of service of process (Pet. App. (i)).[66]Accordingly, it is clear that petitioner has waived any defenses relating to service of process.

Quite simply, petitioner's objection as to personal jurisdiction is insufficient to cover its arguments with respect to the methods of service of process available to respondents under Fed. R. Civ. P. 4. *International Arbitration Centers Inc.* v. *Walsh Trucking Co., Inc.*, 82 Civ. 8709 (S.D.N.Y. June 22, 1984) (AVAILABLE ON

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[65] Petitioner owns and operates Empresa Lineas Maritimas Argentinas S.A. ("ELMA"). According to *Lloyd's List*, this state carrier owns 42 vessels which it operates in a liner service to nine U.S. cities on the East Coast, including New York. The Argentine flag carrier operates on a weekly schedule *taking delivery of cargo through* various newspapers in New York, including the *Journal of Commerce* (*See* August 15, 1988, listing 363). When ELMA ships call at New York and sail in nearby waters they transmit AMVER messages which are ultimately received at the U.S. Coast Guard AMVER Center at Governer's Island in New York Harbour. The injuries, loss of hire, loss of bunkers purchased in New York, and loss of use of the HERCULES occurred in New York. Additionally, Argentina, through ELMA does business and earns substantial revenue from its "international commerce" in New York. *See In the Matter of Rio Grande Transport, supra* at 1161 for a similar contact analysis.

[66] Petitioner's service of process argument presents questions concerning the availability of FSIA §1608 for service under the Alien Tort Statute which cannot be said to be "fairly included" within the questions presented. Sup. Ct. R. 21. 1(a).

LEXIS; Genfed Library; Dist. file), citing *Harris Corp.* v. *National Iranian Radio and Television*, 691 F. 2d 1344, 1353 n. 18 (11th Cir. 1982); *Albert Levine Associates* v. *Hudson*, 43 F.R.D. 392, 393 (S.D.N.Y. 1967); *Melson* v. *Kroger Co.*, 550 F. Supp. 1100, 1104 n. 2 (S.D.Ohio 1983). "A defense of . . . insufficiency of process . . . or service or process is waived (A) if omitted from a motion in the circumstances described in subdivision (g)." Fed. R. Civ. P. 12(h) (1).

Petitioner's arguments with respect to its "amenability to service" under the Alien Tort Statute (Pet. Br. at 45), are misconceived. Neither service of process objections nor personal jurisdiction objections present questions of judicial authority or competence, *United States* v. *Morton*, 467 U.S. 822, 828 n.6 (1984). "[R]egardless of the power of the State to serve process an individual may submit to the jurisdiction of the court by appearance, [or] . . . the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendent may be estopped from raising the issue. " *Insurance Corp. of Ireland* v. *Compagnie Des Bauxites De Guinea*, 456 U.S. 694, 703-704 (1982).

Having failed to object to the federal method of service of process used by respondents, petitioner may not now contend that service was proper only under state procedures and that state personal jurisdiction restrictions apply. Rather, having failed to object to respondents' federal method of service, petitioner must accept that respondents' use of the federal method under 28 U.S.C. §1608 was proper. *Holt* v. *Kloster Rederi A/S*, 355 F. Supp. 354, 357-358 (W.D. Mich. 1973). This is particularly true because in this case, unlike in *Omni Capital International* v. *Rudolf Wolf & Co.*, ___U.S .___, 108 S.Ct. 404 (1987), petitioner never contended that state personal jurisdiction requirements should be applicable to the suit until after *certiorari* was granted.[67] Having failed to present these issues concerning service of process or personal jurisdiction below, petitioner is not entitled to have the Court pass upon them.

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[67] Petitioner's brief on appeal before the court of appeals recited that "[s]ervice on Argentina was made in accordance with . . . 28 U.S.C. §1608(a) (3)" without complaint.

Conclusion

The judgment of the court of appeals should be affirmed and the matter remanded to the court of appeals for further proceedings in accordance with the decision of the Court.

Respectfully submitted,

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Constitution, Treaties, Statutes, and Regulations

Constitutional Provisions Involved

U.S. CONST. art. I, §8, cl. 10

The Congress shall have power . . .

To define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations;

U.S. CONST. art. III, §2, cl. 1

The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction;

U.S. CONST. amend.V

No person shall be . . . deprived of . . . liberty, or property, without due process of law . . .

Statutes Involved

1. The Alien Tort Statute, 28 U.S.C. §1350 (1982) reads as follows:

§1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

2. The Merchant Marine Act of 1920, 46 U.S.C. § 877, reads in relevant part as follows:

§ 877. Coastwise laws extended to island Territories and possessions

From and after February 1, 1922, the coastwise laws of the United States shall extend to the island Territories and possessions of the United States . . . . *And provided further,* That the coastwise laws of the United States shall not extend to the Virgin Islands of the United States until the President of the United States shall, by proclamation, declare that such coastwise laws shall extend to the Virgin Islands and fix a date for the going into effect of same.

3. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1332 (a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1982), reads in relevant part as follows:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

§ 1603. Definitions

For the purpose of this chapter—

. . . .

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

* * * * *

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state.

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * * * *

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment;

Treaties Involved

1. The Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, reads in relevant parts as follows:

Article 1

The term "high seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.

Article 2

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

(1) Freedom of navigation;
(2) Freedom of fishing;
(3) Freedom to lay submarine cables and pipelines;
(4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

Article 20

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft, for any loss or damage caused by the seizure.

Article 23

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to

believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

3. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship are within the limits of the territorial sea, or as the case may be within the contiguous zone. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

4. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.

5. Where hot pursuit is effected by an aircraft:

(a) The provisions of paragraphs 1 to 3 of the present article shall apply *mutatis mutandis;*

(b) The aircraft giving the order to stop must itself actively pursue the ship until a ship or aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself

or other aircraft or ships which continue the pursuit without interruption.

6. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an enquiry before the competent authorities, may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the high seas, if the circumstances rendered this necessary.

7. Where a ship has been stopped or arrested on the high seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

2. The Pan-American Convention Relating to Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989, reads in relevant part as follows:

> Art. 3. Belligerent states are obligated to refrain from performing acts of war in neutral waters or other acts which may constitute on the part of the state that tolerates them, a violation of neutrality.
>
> . . . .
>
> Art. 27. A belligerent shall indemnify the damage caused by its violations of the foregoing provisions. It shall likewise be responsible for the acts of persons who may belong to its armed forces.

3. The Treaty of Friendship, Commerce, and Navigation Between the United States and Liberia, Aug. 8, 1938, 54 Stat. 1739, T.S. No. 956, reads in relevant parts as follows:

> *ARTICLE I*
>
> The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well as for prosecution as for defense of their rights, and in all degrees of jurisdiction established by law.
>
> • • • •
>
> The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect

that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.

• • • •

Article VII

Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most-favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation.

4. CONVENTION between Great Britain and Buenos Ayres, for the Settlement of British Claims. Signed at Buenos Ayres, 19th July, 1830.

WHEREAS certain of his Britannic Majesty's subjects have demands pending against the Government of Buenos Ayres, for indemnification for illegal acts and violences, committed by privateers commissioned by them during the late war with the Emperor of Brazil, and whereas for the liquidation of those claims, a Mixed Commission was appointed by the Government of Buenos Ayres, in the month of October last, which commission, after having proceeded to the examination of some cases presented to them, have experienced considerable difficulty in arriving at a determination thereupon; and the Government of Buenos Ayres desiring to give a proof of their disposition to bring these long standing claims to as speedy a settlement as possible, and having consulted with His Britannic Majesty's Charge' d'Affaires thereupon, who has been charged by his Government to promote the adjustment of these cases, they have agreed with the said Charge' d'Affaires upon the following mode of providing for the final settlement of the remaining cases, viz: —

Art. I. The liquidation of the remaining cases of His Britannic Majesty's subjects against the Government of Buenos Ayres, arising out of the acts of their privateers in the late war, shall be removed to London.

II. For the purpose of giving effect to this Article, a new commission shall be named, to consist of 2 individuals, one to be appointed by the Government of Buenos Ayres, the other to be named by His Britannic Majesty's Government on behalf of the claimants.

III. The said commission shall meet in London in 6 months from this date.

IV. Due notice of the appointment and meeting of the commission shall be given in the London Gazette, and a limited period shall at the same time be fixed for the reception of claims, after the expiration of which no other shall be entertained.

V. With respect to the form in which the said claims shall be proved and substantiated by the parties interested, the commissioners shall guide themselves by the general rules and practice according to the Law of Nations.

VI. So soon as the amount of any claim shall have been determined by the commission, a certificate thereof shall be delivered to the claimant, signed by the commissioners.

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In virtue of which, and for the corresponding ends, 2 copies of this Convention have been signed and exchanged in Buenos Ayres, this 19th day of July, 1830.

WOODBINE PARISH,

Charge' d'Affaires of His Britannic Majesty.

MANUEL J. GARCIA

Minister of Finance, charged with the Department of Government for Foreign Affairs.

Memorandum annexed to the preceding Convention.

Memorandum of the British Claims against the Government of Buenos Ayres.

The innocent part of the cargo of the *Huskisson*,

	(approximate value) -				£.	9068	0 0
Case of the	*Concord*	-	-	-		1064	4 8
	Anne -	-	-	-		1912	18 10
	Albuera	-	-	-		2632	12 0
	Hellvellyn	-	-	-		2227	1 8
	George and James		-	-		3821	18 8

Mr. Carvallio's claim, 1351 milreis	-	about 304 0 0
Total approximate amount in sterling,	-	£.21,030 15 5

WOODBINE PARISH.
MANUEL J. GARCIA.

Foreign Law Involved

1. Article 31 of the Constitution of the Argentine Republic

This Constitution, the Laws of Nation which are a consequence of that dictated by the Congress and the Treaties with foreign plenipotentiaries are the supreme law of the nation; and the authorities of each province are obligated to confirm to this law, notwithstanding any other disposition to the contrary which is contained in the provincial laws and constitutions.

2. Argentine Decree of November 4, 1828

With the object of satisfying the claims that have been made and will be made in the future by the nationals or subjects of friendly or neutral powers, about illegal acts committed by the corsairs of the Republic during the war with the Empire of Brazil, the Government has agreed and decreed:

Article 1 - A commission composed of three individuals will be named by the Minister of External Relations, that will become acquainted with the claims and settle the accounts that arise against the shipowners of the privateers for illegal acts committed during its cruise.

Article 2 - The settlements carried out by the commission will be taken to the Government for the corresponding resolution.

3. Spanish Corsair Ordinance of 1801

Article 21 - They will be allowed to navigate freely and without the least detention, the vessels whose captains present in good faith all their papers, and let it be known through them the neutral ownership of the same and of its cargo, even though they are destined for enemy ports, on the condition that these not be blockaded and they do not carry prohibited goods or are reputed to carry contraband, and on the condition that the enemy observe the same conduct with the neutral ships and goods.

Article 22 - If in these and other cases the vessels belong to my vassals, or allied and neutral nations were detained, and led to ports different from their destination against the expressed rules, and without having given them just cause for their courses, papers, resistance, suspicious flights, quality of their cargo and other legitimate reasons founded on treaties and general customs of the Nations, the privateers that caused the detention will be condemned to pay the demurrage and all the damages, injuries and costs caused by the detained vessel, in adjustment with Articles 14 and 15 of this Ordinance, and if the vessels whose damages they caused were from my fleet, the Juntas or naval judges will give an immediate account with justification and their judgment, through the Secretary of their office so that I may resolve the compensation and the rest that corresponds in order to correct the damages and to avoid it in the future.

4. Argentine Provisional Regulation For Privateering of 1817

Article 8 - All prizes will be sent to the port of the State to be judged through legal procedures in use in similar cases; but if an extraordinary circumstance occurred which would impede it, the commander of the privateer will use his discretionary judgment (arbitration) deliberating its security, and keeping the justifying documents, that he will present in time to the competent tribunal.

Article 19 - Not a legitimate prize being the result of the sentence of said tribunal, or not having the space for its detention, it will be freed incontinenti causing it the least expenditure, not even with respect to port duties. And if under this or other pretext it were detained any longer, the one causing this delay will be responsible for the damages and injuries that result to the owners.

Article 44 - If the detained vessel were not determined judicially to be a good prize, its possession will be immediately reestablished to the captain or owner, with its officers and crew, to which everything that belongs to them will be restored without retaining the least thing. It will be provided convenient safe conduct so that without further delay it continue its voyage without forcing it to pay port duties; and on the contrary before its exit from port they will be satisfied by the privateer the expenditures, damages and injuries caused them, and will claim in justice if they find themselves comprised in the anticipated cases in Articles 22 and

30, but there will not be such claim if said vessel had given just motive for suspicion or others declared in these regulations, and through which proceedings would have been established, what should precisely be on record from the proceedings which have been followed and in its consequence.